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The moral status of human fetuses.

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The Moral Status of Human Fetuses

A Dissertation Presented

by

Lucille R. Cormier

Submitted to the Graduate School of the
University of Massachusetts in partial fulfillment
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

February, 1988

Department of Philosophy

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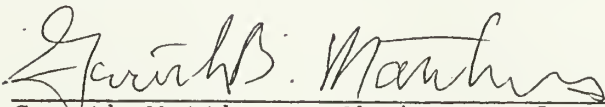
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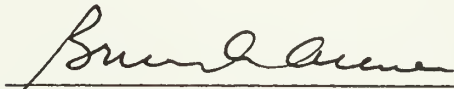
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LUCILLE R. CORMIER

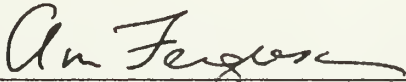
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Gareth Matthews, Chairman of Committee



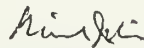
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ABSTRACT
THE MORAL STATUS OF HUMAN FETUSES
FEBRUARY, 1988
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The study attempts to determine whether or not human fetuses have moral status. It seeks to establish whether or not they are the subjects of rights or if there are persuasive reasons for taking their interests into account in our moral decisions.

Three broad categories of answers to the question are analyzed. The arguments developed by Michael Tooley in Abortion and Infanticide are assessed as representative of a liberal view. Those of L.W. Sumner in Abortion and Moral Theory stand as moderate claims and the position defended by William May in "Abortion and Man's Moral Being" represents a conservative position. The work of other authors is drawn upon to help analyze the central arguments and to provide alternate interpretations. Among these are Jane English, Judith Thomson, Christina Hoff Sommers, Ronald Green, Joseph Donceel, Lawrence Becker, and Gareth Matthews.

Though each of the three principal authors is found to present

potentially forceful arguments, none of them is thought to provide a fully convincing account of the moral status of fetuses. Important difficulties stem from the use of particular theories of rights and from inadequate treatment of the concept of potentiality.

The study arrives at two conclusions. The first is that arguments for or against the moral status of fetuses are grounded in more basic, conflicting moral theories about rights or moral behavior. Thus the question of the moral status of fetuses is not likely to receive a universally acceptable answer before moral philosophers come to agreement on basic moral principles.

The second is that the discussions above have nonetheless yielded two important considerations which together form the basis of a tenable position on the moral status of fetuses. I suggest that an argument can be developed from two claims. One is a conservative claim that an embryo or fetus is the same entity as a later human being. The other is a moral principle discussed by Michael Tooley, viz. that where an entity will at some time in its life have rights, it is wrong to affect it so that the entity will be incapable of exercising those rights when the time comes. The argument supports the conclusion that, from the period of the embryo on, there is an entity that merits our moral consideration.

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Chapter 1: Introduction

1.1 The Moral Status of Fetuses

The vexing question of the moral status of human fetuses is at the heart of several contemporary issues in bioethics. It has been the centerpiece of the polemics of abortion where fetal rights are asserted on one side and denied on the other. It colors views on the moral limits to fetal experimentation and the use of fetuses as organ farms. It compounds itself into a number of dilemmas for childbearing women, counterposing duties to insure fetal health against rights to privacy and autonomy. The question forces all who think about it to assess their commitment to women's autonomy, to women's power to control their own lives, to their competence in making life and death decisions. And it pushes us to confront beliefs about parents' obligations to support and protect offspring, about everyone's duties to cause no harm, to protect and defend those who are weak and helpless. The answer one gives, then, to the question of fetal moral status has explosive practical implications.

The issue is no less interesting in its theoretical dimension. It requires that the notion of moral standing itself be clarified, that theories of rights be articulated and defended. Concepts of personhood and theories of personal identity are woven into some of

the arguments and so must be justified in their own right. Further, arguments from all periods in the history of philosophy need to be considered, from Aristotelian hylomorphic theory and doctrine of potency, to Scholastic formulations of natural law theory, to classical utilitarian thought. Our century has contributed the more sophisticated vocabulary of embryology and the feminist focus on the primacy of elected or freely undertaken duties for genuine moral agents.

Yet another interesting facet of the discussion is the illumination of moral intuitions. It becomes evident that a strong underlying reason for supporting one moral view or another is that what it permits "feels" moral and that what it forbids truly "feels" wrong. One is expected oftentimes just to "see" that, for example, infanticide is evil or that being a Good Samaritan is right. Thus, the role and relevance of moral intuitions must be weighed into the evaluation of theories about moral status.

All this makes for an enormously interesting and complex project but one whose goal is easy to articulate: we are trying to determine whether human fetuses have moral standing or not. I warn in advance that I have not discovered *the* definitive answer. What I hope this study does do, however, is to eliminate fruitless avenues of defense and to illuminate the roots of disagreements as well as important dimensions to the question that one faction or the other has not considered. In so doing, I hope to advance the discussion of fetal moral status and substantiate a view of what I believe to be necessary elements in a well-formed solution.

1.2 Methodology

I did not begin the research with the intention of defending any one particular point of view. Rather, knowing that a range of opinions on the status of fetuses had already been formulated, I proposed to look through as many of them as was feasible, choose the best among them and look at these representative few in good detail.

My criteria for "best" have been: (1) comprehensiveness, where I have preferred work that encompassed a number of arguments rather than that which addressed only one point, (2) importance, where the work is often cited in other articles or books, (3) depth, where the author not only defended a view on the status of fetuses but attempted to ground his argument in a general moral theory and (4) currency, since other things being equal, I have preferred more recent works to older ones.

With these criteria in mind then, I have chosen Michael Tooley's text, Abortion and Infanticide, as representative of the liberal view of fetal moral status, L.W. Sumner's book, Abortion and Moral Theory, as representative of a moderate view, and William May's paper, "Abortion and Man's Moral Being", as a conservative defense of the claim that all fetuses have moral status. I have freely drawn on other authors' work to help analyze the main arguments, to provide alternate interpretations, objections or lines of reasoning.

Chapter 1 is an analysis of Tooley's three arguments against fetal moral standing, the first generated from his theory of rights as entitlements generated from desire, the second and third levelled, respectively, against claims that fetuses have moral standing in virtue of being innocent human beings and in virtue of their status as potential persons.

In Chapter 2, I look at L.W. Sumner's four-part defense of a moderate view. The first two parts are negative arguments, the first directed against liberal claims, the second against conservative. The third is an intuitive argument for his "differential" view that fetuses acquire moral standing gradually during gestation. He rounds out his position in the fourth part by offering a defense of classical utilitarian theory and arguing that his differential view is implied by that theory.

Chapter 3 is a reconstruction and analysis of a conservative argument for fetal standing based on William May's discussion. He offers two principles to support his conclusion that all fetuses have moral status: (1) a humanitarian principle that all humans have equal moral standing, and (2) a "membership" claim that all fetuses are human beings, i.e. members of the species *homo sapiens*.

My goal in all three chapters is to clarify each position and show both its strengths and weaknesses. In the concluding chapter, I summarize what has thus far been found, draw conclusions about work that needs to be done and suggest a direction for future research.

Although my intent has been primarily to clarify and assess

claims about the moral standing of human fetuses, it was inevitable that this process should lead to the formulation of an opinion on the subject. Indeed, I would have thought it a failure had such study *not* yielded the basis for a defensible view. In the closing pages of the conclusion, then, I give reasons for deciding that fetuses from the point of individuation must be reckoned to have moral standing.

1.3 Terms

The question is whether or not human fetuses have moral status. The two most important terms to clarify then are "human fetus" and "moral status."

A human fetus, strictly speaking, is an unborn human offspring from the end of the third month of pregnancy until birth. It is preceded by the embryo and zygote. As a rule, however, I will use the term "fetus" to speak of an unborn human offspring at any stage of its development prior to birth. At times, it will be useful to refer to the fetus as being at a particular stage of development. In those cases, I will use either the medically correct term or a more generally descriptive one such as "the very early fetus" or "older fetuses." In general, context will determine the extent to which more or less precise terminology is desirable.

The notion of moral status is more difficult to fix. That an entity has moral status commonly means that it is an object of moral concern, or, in other words, that it is the kind of thing whose

treatment has some direct moral consequence. L.W. Sumner offers a very cogent analysis of it as a normative property which indicates that an entity "counts" for something in the moral community:

Moral status is a determinable whose values can be ordered along a continuum. The established views [on the morality of abortion] have fastened upon the limits of that continuum. Thus, counting for nothing is one limiting form of moral status, as is counting for for just as much as the paradigm of a normal adult human being. Every physical object has some moral status or other; it makes no more sense to say that a thing lacks moral status altogether than to say that it lacks shape or color. We therefore need some term to designate what it is that liberals withhold from and conservatives award to fetuses. This we shall call *moral standing*. To count for nothing is to have *no moral standing*. Thus to count for something is to have (some) moral standing, and to count for as much as possible is to have *full moral standing*.
(Sumner,1981:26)

Sumner also says that entities which count for "as much as possible" have a right to life. This right, he claims, is as strong as any person's right to life. (Sumner,1981: passim, 30)

Sumner's analysis of the concept of moral standing implies that the criteria for having a right to life are also criteria for having full moral standing. But I do not believe that discussion of moral status is necessarily bound up with showing that an entity has a right to life. For instance, where it was shown that moral principles about fairness, compassion or decency ought to extend to our behavior towards an entity S as much as they do to our behavior towards innocent adult human beings, it would also be shown that S

counted for as much as possible, i.e. that S had full moral status. Therefore, I would expand Sumner's analysis to capture this point.

The notion of moral status will mean:

S has moral status if and only if whichever moral rules govern the actions of moral agents towards innocent adult human beings also govern their actions towards S.

Thus, the project at hand is to be characterized as one of determining whether or not the moral rules by which we justify our behavior towards innocent adult human beings ought also to govern our behavior towards fetuses. We want to know whether moral agents have duties towards fetuses such that they must extend as much effort towards their protection as they must towards the protection of any innocent adult human being.

Sometimes questions about fetal moral standing are phrased as questions about the personhood of fetuses, e.g. is the fetus a person? But as there is considerable difference of opinion about the meaning of the term "person", I believe that phrasing the question of a fetus' moral status in terms of its possible personhood would only serve to confuse and complicate. Therefore, I disassociate the question of fetal moral status from that of fetal personhood and refrain from using the term "person" as much as possible in the course of this study. I assume no particular view on the relation of criteria for moral standing to those for personhood.¹

The question of moral status is also, at times, phrased as a

¹See for example Ruth Macklin's, "Personhood in the Bioethics Literature" for an excellent survey of the variety of analyses of the concept of "person." (Macklin;1983)

question about the humanity of the fetus, that is, whether the fetus is "a human being" or "human" or "a human." In such cases, it is necessary to determine what sort of an answer is expected. For instance, it may be that the inquirer wants to know whether a fetus is a human fetus as opposed to a feline or canine fetus. Or, perhaps the question is about whether or not a fetus is a human thing, like a human organ or tissue. Or again, it could be the case that someone want to know whether the fetus is a human being in the sense that it is a member of the species *homo sapiens*. Therefore, it will usually be necessary to clarify questions about a fetus' "humanity."

It is worthwhile noting, however, that when the question is whether or not a fetus is a human being, a member of *homo sapiens*, an affirmative answer need not imply that a fetus has full moral standing. Further reasoning will be required to show that membership in the species is sufficient for having full moral status.

During the course of this study, I will also frequently refer to views about the moral standing of fetuses as "liberal", "moderate" or "conservative." When a view is said to be liberal, it will mean that the view asserts that no fetus has any moral standing; when a view is said to be moderate, it will mean that it is a claim that some fetuses have full moral standing but that some have less than full standing. And, when a view is said to be conservative, it will mean that it asserts that all fetuses have full moral standing.

Last, for the sake of simplicity, I will refer to fetuses having full moral status merely as their "having moral status."

To summarize, the central question of the inquiry is whether human fetuses have moral status. "Fetus" will, unless otherwise indicated, refer to an unborn human offspring at any time during gestation. Having "moral status" will mean, in general, counting for as much as possible in the moral community and this will mean that whichever moral rules govern our behavior towards innocent adult human beings ought also govern our behavior towards human fetuses.

I do not assumed that "having moral status" is equivalent to "being a person" nor that "being a human being" implies that something has moral status or that it is a person. Whenever the term "human being" is used, it is used in a non-normative sense to denote a member of the species, *homo sapiens*.

1.4 Importance of the Question

I have said above that the question of the moral status of human fetuses is the centerpiece of the current debate over abortion rights and so it seems for in a well-populated world where abortions are safe medical procedures, nothing less than an appeal to the moral status of the fetus could warrant forbidding the elective termination of a burdensome pregnancy. Why prevent a woman from procuring an abortion unless her action becomes also the destruction of a being that has great moral worth? If fetuses don't count morally then why not be permitted to destroy them, especially where their continued existence creates difficulty and hardship? It appears that the question of the morality of abortion then turns on the

determination of whether or not human fetuses have moral worth.

However, should it turn out that abortion can be justified even if fetuses have moral status, the importance of showing that they have or lack moral standing diminishes considerably. We will still need an answer to the question in order to adjudicate claims about the morality of non-therapeutic fetal experimentation, the use of fetuses as organ donors, and policies about the treatment of fetuses conceived *in vitro*. But a major impetus for justifying an opinion about fetal moral status will have been removed were it to be shown that a fetus' moral status is not decisive in determining whether abortion is, or may be, permissible.

In view of this, I think it important to assess the claim that abortion is morally permissible even if fetuses have moral status. The view is defended by Judith Jarvis Thomson in her classic paper, "A Defense of Abortion" (Thomson, 1971) and with a different argument by Jane English in "Abortion and the Concept of a Person." (English, 1977) What follows is a discussion of both their arguments.

1.4.1 Justifiable Defense

Many anti-abortion arguments are based on the moral principle that the innocent ought not be made to suffer and, a fortiori, ought not be killed. Where fetuses are thought to be paradigmatic examples of moral innocence, their abortions are called unjustifiable homicides.

Jane English's argument for the permissibility of abortion draws

on an exception to the principle, that is, that in certain cases of self-defense, killing the innocent is morally defensible. The following is an example she offers to draw out our intuitions about self-defense against innocent attackers:

Suppose a mad scientist, for instance, hypnotized innocent people to jump out of bushes and attack innocent passers-by with knives. If you were so attacked, we agree you have a right to kill the attacker in self-defense, if killing him is the only way to protect your life or to save yourself from serious injury. It does not matter here that the attacker is not malicious but himself an innocent pawn.
(English, 1977:421)

The example is effective in confirming a judgment that the moral rules governing our behavior towards innocent human beings are overridden or suspended in cases of self-defense.

English does not, however, endorse the view that one may *kill* every innocent (or even malicious) attacker. As the passage reveals, she believes that killing is justified only if it is the sole way to protect or save one's life. And still, even where inflicting an injury suffices to repel the attack, she will not allow that the victim should harm the aggressor much more seriously than he himself would have been harmed. For instance, she writes:

... our laws and customs seem to say that you may create an injury somewhat, but not enormously, greater than the injury to be avoided. To fend off an attack whose outcome would be as serious as rape, a severe beating or the loss of a finger, you may shoot; to avoid having your clothes torn, you may blacken an eye.

Aside from this, the injury you may inflict should only be the minimum necessary to deter or incapacitate the

attacker. Even if you know he intends to kill you, you are not justified in shooting him if you could equally well save yourself by the simple expedient of running away. Self-defense is for the purpose of avoiding harms rather than equalizing harms. (English, 1977:421)

Thus far, she has described guidelines for moral behavior towards innocent human beings who pose an immediate threat to life or well-being. Later in her paper, she offers another example to elicit intuitions about the justifiability of defending oneself against innocent human beings whose actions will cause you serious harm in the foreseeable future. I believe it is not necessary to reproduce the example to agree with her conclusion that acting in self-defense is appropriate where the harm will be inflicted but only at a later date. Surely, if the *only* difference between two threats is that one will cause an immediate harm and the other will cause it in the future, one is justified in protecting oneself as forcefully from the latter as from the former.

English sees a parallel between situations like those of the innocent attacker above and certain cases of pregnancy. Though the fetus is itself innocent, if it poses a serious threat to a woman's life or well-being, now or later, it can be thought of as an innocent attacker. And, if there is no way of stopping its threat short of killing it, an abortion may be construed as an act of justifiable self-defense.

I think English has captured an intuition that frequently motivates a "pro-choice" stance on the justifiability of abortion.

Being or remaining pregnant in some instances directly and immediately threatens a woman's life or well-being and bearing the responsibility of providing for the child that issues from a pregnancy can constitute a serious threat to her emotional as well as physical well-being. If one adds to this the feelings of fear and desperation that accompany threatening pregnancies, it becomes even easier to see them as assaults by an innocent attacker. One might say that from a phenomenological perspective, the two experiences are very similar.

Still, upon reflection, it seems that not very many abortions of threatening pregnancies will be justified by appealing to principles of self-defense. One category that would be excluded would be abortions of pregnancies that pose a future threat to a woman because the responsibility of the future child is very seriously burdensome; in these cases, the threat issues not from a fetus but from a baby or child. And, since, to use English's expression, a woman can escape from this threat "by the simple expedient of running away" it would seem that the moral thing to do would be to "run away", perhaps by letting the baby out for adoption rather than killing a fetus that is presumed to be a person. It must be recalled that according to the principles set out above, killing in self-defense must be a last resort in order to be justifiable; thus, where the threat is posed by a baby or child and a woman can escape from it, it would seem that she cannot justify an abortion on the grounds of self-defense.

The range of abortions justified in self-defense, then, is

appreciably narrowed. Only where a continued *pregnancy* threatens a woman's life or well-being would she be able to abort it in self-defense.

Beyond these initial doubts there is reason to question whether the self-defense model is really applicable to cases of threatening pregnancy. I want to suggest that the two states of affairs are sufficiently disanalogous that it is not appropriate to appeal to moral rules about self-defense in justifying the abortion of threatening pregnancies.

One difference is that in the self-defense model, the innocent aggressor is an individual who typically causes harm by inflicting blows or punches or by shooting or stabbing. Certainly a fetus does not fit this description. If a fetus is an attacker, then it is one in some other sense of the word.

Marjorie Reilly Maguire has likened the fetus to a parasite that invades a woman's body, in some cases debilitating it, draining it of vigor or even threatening life itself. (Maguire et al, 1986) We must think of the fetus as an invader or a subversive and interpret its "attack" as like that of a virus' or parasitical tapeworm's.

But likening fetuses to viruses or parasites is unfelicitous, for fetuses are assumed to have moral standing which makes them morally very different from flu viruses or tapeworms. The situation of Siamese twins where one needs to use a vital organ in the other's body in order to survive is, I think, a better analogy. In such a case, the parasitical twin has moral standing but may be detached even though it will die as a result of it. This could be justified as an act

of self-defense in behalf of the normal twin who would die if the dependent twin were not detached.

Strictly speaking, this analogy shows that abortions are justifiable only when they threaten a woman's very life. However, I think it is plausible to say that if the dependent twin's continued existence meant a life of intolerable restriction for the normal twin, it could be killed to defend the healthy twin's well-being.

Still, the analogy is not good enough to justify aborting all pregnancies that are not life threatening but pose great hardship for the pregnant woman. This is because of the fetus' special relation to the woman. It is her offspring, and it is commonly thought that offspring enjoy a fiduciary relation with their parents, one that allows them the use of their parents' resources even when that use places much hardship on the parents. No one would say that parents have, literally, to die in order that their offspring could live - that would be heroic - but a goodly amount of discomfort and difficulty is not thought to be an unreasonable part of caring for offspring. Given this dimension of the situation, it appears that even though it is permissible to ward off an attack that would deprive one of goods that are equivalent in value to life² and to kill the attacker if need be, the fiduciary obligations of parent to child take precedence and one may not justify harming offspring because the responsibilities of caring for them entail a sharp curtailment of

²Some goods that are thought to be equal in value to life and against whose loss a person may defend himself are (1) limbs and faculties (2) sanity (3) liberty (4) chastity (5) material goods of great value. See, for example, Austin Fagothey, Right and Reason, (Saint Louis, 1967:237-238).

liberty or a threat to one's sanity.

Thus, it would seem that the number of permissible abortions becomes even smaller; only pregnancies that directly threaten a woman's life or those that create intolerable hardship may be terminated in self-defense.

Aside from the reasons offered so far, there is further cause to question the adequacy of a self-defense model for most distressful pregnancies. It seems to me that fetuses who are part of a burdensome pregnancy can be thought of not so much as innocent aggressors but as unwitting and essential elements in critically bad states of affairs. They seem to be more like innocent third-parties whose very presence creates danger or trouble. Consider the following "very bad situations":

Very Bad Situation I: S and Y climb aboard a lifeboat at the same time. There is only enough food to last one person until the soonest possible rescue time. Also, there is only one hat, one raincoat and so forth. The lack of resources is seriously distressful and life-threatening to both S and Y yet it is not clear that either is an attacker.

Very Bad Situation II: Prince Charming discovers Snow White's glass coffin in the wicked queen's dungeon (with the sleeping Snow White in it.) The queen, however, locks him in and he cannot escape except by taking the key from Snow White's hands. But if he does this, the coffin will explode. (The queen has wired it!) Now the queen promises to let them go when the effects of the poisoned apple wear off, but staying in the dungeon is seriously distressful for the prince. May he retrieve the key and destroy Snow White as an

innocent aggressor?

Very Bad Situation III: (from a "M*A*S*H" episode)

The shelter of a number of people will be revealed if the baby keeps crying. The people will surely be captured and possibly killed if they are discovered. Is the baby an innocent aggressor?

In all these cases, it is not plausible to say that the protagonist, though essential to the badness of the situation, is an aggressor. It may be that killing them could be justified, but not as acts of self-defense. In the same way, it seems that fetuses as unwitting, though key, elements in a very bad situation, viz. a distressful pregnancy, might justifiably be destroyed but not because they are innocent aggressors.

In view of this, I would claim that unless a fetus' continued existence constitutes a serious threat to a woman's life or imposes such burdens as could not reasonably be expected to be borne by a parent in behalf of its child for a length of time equal to that of a pregnancy, its abortion cannot be justified as an act of self-defense.

English has made a good case for downplaying the significance of a fetus' innocence in judgments about the morality of abortion, but I believe that she has not gained much in the way of defending certain abortions as instances of self-defense. In light of this, it is still fair to say that the fetus' moral standing is no small factor in deciding the morality of the great majority of abortions that would be performed, as well as for determining the permissibility of using fetuses in non-therapeutic medical research.

1.4.2 Having a Right to Life

Judith Jarvis Thomson also defends the claim that many abortions are morally permissible even when the fetus is taken to have moral standing. She argues that though we may assume for purposes of argument that a fetus has moral standing and thus a right to life, we do not from that assumption move inevitably to the conclusion that a fetus (or any person) may never be killed.

Very often, just the contrary of her claim is assumed by writers who believe that once it is shown that fetuses have a right to life, everything is won. They infer that if a fetus has a right to life everything possible must be done to support and preserve its life. Thomson describes a category of circumstances in which the fetus' right to life does not imply a corresponding duty in justice against anyone to preserve its life.

Her now familiar example of the ill-fated violinist and his reluctant savior is offered to elicit our intuitions about the limits of duties that a right to life can generate.

You wake up in the morning and find yourself back to back with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own.

(Thomson, in Feinberg, 1984:174)

As the story continues, the hospital director is apologetic but adamant in his belief that you may not unplug yourself from the violinist because doing so would kill him and thus violate his right to life.

Thomson considers a number of factors that might weight a decision about the morality of disconnecting oneself from the violinist, for instance, the length of time required or the effect on one's own health. But she concludes correctly that one factor that would not weight the decision is the violinist's right to life.

She reasons that a positive or welfare right to life implies that the bearer should be provided with what he needs to sustain his life but that one thing he may not command is the use of another person's body. In justice, no one has a right against anyone that they should give over their body or body parts even if they are needed for life itself. In support of her reasoning, one could cite the widely held belief that no one has a right to commandeer our organs or bone marrow or even our blood - even though they need it for life itself.

Thus, that a fetus has a right to life does not imply that a woman has a duty to give over her body for its life support.

Thomson allows that where a woman voluntarily engages in unprotected intercourse, it may be said that she has at least tacitly given a fetus the right to use her body and that she then has a duty to bring the pregnancy to term. This will exclude pregnancies that come about as a result of rape or contraceptive failure.

Thomson does not consider an observation that is sometimes

made to the effect that any engagement in sexual activities that could bring about a pregnancy, no matter how well protected, constitutes an "invitation" by a woman to a fetus to use her body for life support.

On the face of it, the point seems to have some merit. If one understands what consequences may follow from a proposed action and then freely consents to it, it would seem that one ought to accept the responsibility for the consequences that flow from the action. But, to use Thomson's expression, "there are cases and cases, and the details make a difference." The issue of ignorance is no small factor in at least many teen-aged pregnancies, and it is doubtful that many distressful pregnancies were consented to freely. Where there is immaturity or where human emotional and physical needs are great, it is hard to say that engaging in sexual activity is a free act. In many cases, it will not be anywhere near a sufficiently free act to constitute an "invitation" to a fetus which grants it the right to use a woman's body.

However, where the consequences of engaging in sexual activity are fully appreciated and the limitations of contraception are known and there are no overwhelming "inner" constraints on her ability to act freely, then a woman's action could be construed as a willingness to grant a fetus a right against her that it should have the use of her body.

Perhaps then Thomson's case is somewhat weaker than she supposes. It will not be that a fetus' right to life never obliges a

woman to grant it the use of her body. There is something to be said for the view outlined above that would allow fetuses conceived in stone cold sobriety where the full import of the sexual act is completely appreciated and the woman is not coerced into it, to claim that their right to life includes the right to the use of the woman's body.

Thus, the great majority of abortions could not be called immoral just because they are a violation of a 'fetus' right to life. Thomson's point is, in the end, well taken.

But, if a fetus has moral standing, our behavior towards it will be governed by moral rules other than those about rights and justice and it may be that abortions are wrong for reasons other than their being unjust acts. Thomson considers two other sources from which one could derive the wrongness of abortion.

The first is from our moral obligations to be minimally decent to each other where there is little cost to us, we ought to help someone in need. For instance, she contends that ...

We surely must all grant that there may be cases in which it would be morally indecent to detach a person from your body at the cost of his life. Suppose you learn that what the violinist needs is not nine years of your life, but only one hour; all you need to do to save his life is to spend one hour in that bed with him. Suppose also that... [it] would not affect your health in the slightest.

(Thomson, in Feinberg, 1984:182)

- In such a case, even though you were kidnapped, Thomson believes it would be indecent to refuse to help the violinist out.

However, there is a boundary between refusals that are indecent

and those that are acceptable. Thomson phrases the distinction as that between being a Good or Splendid Samaritain and being a Minimally Decent Samaritain. She believes everyone has the obligation to be a Minimally Decent Samaritain but that no one is compelled to be heroic - or to be a Splendid Samaritain.

Except in such cases as the unborn person has a right to demand it - and we are leaving open the possibility that there may be such cases - nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive.
(Thomson, in Feinberg, 1984:184)

Therefore, if our behavior towards fetuses is governed by the ordinary rules of decency and compassion, it follows only that it would be indecent to terminate pregnancies that could be maintained with little discomfort to the woman. She ought to be a Minimally Decent Samaritain. One supposes that some pregnancies are terminated for frivolous reasons, and these abortions would be wrong. However, given the range of personal experiences and the varying emotional and physical strengths of individuals, it is very difficult to fix objective standards of "frivolity." But, in theory at least, if a fetus has moral standing, it would be indecent not to help it out where the cost is not too great.

The second reason it may be wrong to destroy fetuses is that they have a special relation to a pregnant woman.

It may be said that what is important is not merely the fact that the fetus is a person, but that it is a person for whom the woman has a special kind of responsibility issuing from the fact that she is its mother. And it might be argued that all my analogies are therefore irrelevant - for you do not have that special kind of responsibility for that violinist, ... And our attention might be drawn to the fact that men and woman both *are* compelled by law to provide support for their children.

(Thomson, in Feinberg, 1984:186)

Thomson is alluding to the fiduciary obligations of parents towards their children that were mentioned above.³ Perhaps the application of moral rules about the obligations of parents to their children shows that it is wrong for a woman to refuse to support her fetus by allowing it the use of her body.

It seems to me that this is a telling argument, for if fetuses have moral standing, they are morally equal to any of a person's offspring. And if fiduciary obligations require parents to care for their offspring, it follows that they have the duty to care for their unborn offspring as well.

Thomson offers the following response to this argument:

I have in effect dealt (briefly) with this argument in section 4 above; but a (still briefer) recapitulation now may be in order. Surely we do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they

³On pp.14-15, we saw that parents' fiduciary obligations to their children took precedence over moral rules that would allow persons to defend themselves against threats that would take from them goods as valuable as life itself.

have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support from it at the cost of its life because they now find it difficult to go on providing for it. But if they have taken all reasonable precautions against having a child, they do not simply by virtue of their biological relationship to the child who comes into existence have a special responsibility for it. They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse. A Good Samaritain would not refuse - or anyway, a splendid Samaritain, if the sacrifices that had to be made were enormous.
(Thomson, in Feinberg, 1984:186)

It seems from this passage and from "section 4" to which Thomson refers that she sees the obligations that would issue from this "special relationship" as duties due a child in virtue of some right it has.

I believe she is correct about this but I question whether the rights children have against their parents are, as she says, given to them by their parents. Usually these rights are thought of as natural rights that *do* stem from the parent's biological relationship to the child.

If a child's right against its parents is a natural right, it will mean that no pregnant woman ought to terminate a pregnancy for any but life-threatening or exceedingly serious reasons because to do so would cause the death of her unborn offspring. Thomson would disagree with this in that she would reserve the obligation for women who freely undertook responsibility for a fetus, who gave it a right to use her resources. How one decides on the question will depend one's view about whether a child's rights against its parents

are natural or "conferred".

But even if offspring have a natural right to be supported by their parents, it is not so sweeping as to include goods without which the parent would die or goods that are as valuable as life. For instance, no one doubts that a child has a right to shelter in its parents' home, but if he threatens their lives or causes great torment, he may be made to leave. Or if a child were taken hostage and would be released only if its parent took its place, it is not clear that a parent would have a duty to do this.

Fiduciary obligations then can be thought to require Good Samaritainism towards one's children where ordinary decency requires only Minimally Decent Samaritainism towards human beings who are not our offspring. But I think that not even fiduciary obligations require one to be a Splendid Samaritain.

To sum up, on Thomson's view, if fetuses have moral standing, they would count for as much as any other of a woman's offspring. They would have a right to life and we ought to treat them according to ordinary norms of decency. Fetuses upon whom their mothers had conferred rights would be entitled to their support; those which came to be as a result of contraceptive failure or rape would have no such claim.

Thomson has shown correctly that any person's right to life cannot include a right to use another's body or a part of their body even if it is for life itself and hence that a fetus' right to life does not include a claim to the use of its mother's body. There is some room for debate over whether or not *any* voluntary participation in

sexual acts that are procreative constitutes an "invitation" by a woman to a fetus to use her body thus making it wrong for her to withdraw her support once the "invitation" has been "accepted." I thought there would be very few cases in which one could say that merely engaging in intercourse constituted giving a fetus permission to use one's body.

The number of justifiable abortions was limited by considerations of decency. It was seen that abortions for frivolous reasons are wrong. Giving women the benefit of the doubt, it is fair to say that most abortions would not be requested for other than frivolous reasons. Thus, so far, Thomson has shown that most abortions are morally permissible.

However, if it is true that the fiduciary obligations of parents towards their offspring correspond to a natural right to parental support, every fetus could justifiably claim that its mother must take care of it unless the situation is life-threatening or most seriously burdensome. Should it be as Thomson claims, that fiduciary obligations stem from a right "conferred" upon an offspring by its parents, then only "planned" fetuses would be entitled to support.

Without defending the position that children's rights are natural, it would seem reasonably to give that view preference if only because it is consistent with what conventional law requires or because the notion that parents' obligations to their "planned" offspring differ from those to their "unplanned" offspring is

unintuitive.

In light of this, it turns out that many fewer abortions are justifiable. The conditions for permissible abortion will be the same as those for justifiably refusing to continue the support of one's children but with the added factor that turning out a fetus entails its death. Thus, it would be harder to justify an abortion than the turning out of a child who could receive care from another source.

The conclusion to be drawn from Thomson's paper is similar to that drawn from English's above. Thomson has made a good case for downplaying the significance of having a right to life in judgments about the morality of abortion but she has not gained much by way of justifying very many abortions. Where a fetus counts as much as any of a woman's offspring, it will be wrong for her to fail to support it except in very extreme circumstances.

To ask whether a fetus counts as much as any other offspring is a way of asking whether or not it has moral standing. Though I believe English and Thomson have shown that an extreme conservative view that condemns all abortions is untenable, what follows from their reasoning is that the greater part of abortions that are allowed within the law are, in fact, morally unjustifiable. If fetuses have moral standing, it may well be that this is true. Much is at stake then in resolving the issue and I believe that an attempt to do so will be of service.

Chapter 2: Michael Tooley: A Liberal View

Michael Tooley's work stands out as, unquestionably, the most comprehensive and original defense of the liberal position on the morality of abortion. His claim is that since no fetus has an inherent right to life, abortion at any point in pregnancy and for any reason is permissible (Tooley, 1972,1983,1984).

The cornerstone of his argument is the contention that no fetus has moral standing. His defense of it is essentially negative; he will refute arguments that purport to show that there is reason to think that fetuses have moral status. The three that he addresses are based first, on the fetus' alleged right to life; second, on its status as an innocent member of the human species and third, on the significance of its potential for becoming an adult human being.

My intention in this chapter is to reconstruct Tooley's refuting arguments against the moral status of fetuses and to discuss their strengths and weaknesses. I will draw almost exclusively from his text, Abortion and Infanticide (Tooley,1983), since it is his most comprehensive treatment of the issue and recapitulates his original argument which was first published in a paper for the journal, Philosophy and Public Affairs, in 1972. The 1984 article, "In Defense of Abortion and Infanticide", was written especially for Joel Feinberg's anthology, The Problem of Abortion, and only summarizes his theory of rights. The text, then, is the best source for a definitive statement of Tooley's view as well as his forum for responding to objections that were raised against it in the time

since it first appeared in 1972.

2.1 The Fetus' Right to Life

Perhaps the most often cited proof that the fetus has moral standing is the claim that it has a right to life. That an entity has a right to life is a sufficient reason for saying that it has moral standing. Hence, if it can be shown that fetuses do have a defensible right against us that we should not destroy them, they would certainly "count" for something in the moral community.

Tooley argues against the view from principles about the very nature of rights. He will elaborate a theory of rights from which it will be seen that fetuses are not the kinds of things that can be the subjects of rights. Hence, they are not the kinds of things that can have a right to life.

The theory of rights that Tooley appeals to is Joel Feinberg's theory of rights as claims derived from an entity's interests. The part of it that is of special interest to Tooley and which he cites is the conceptual relation Feinberg sees between rights and interests:

Now we can extract from our discussion of animal rights a crucial principle for tentative use in the resolution of other riddles about the applicability of the concept of a right, namely, that the sorts of beings who *can* have rights are precisely those who have (or can have) interests. I have come to this tentative conclusion for two reasons: (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or 'sake' of its own. Thus a being without interests has

no 'behalf' to act in, and no 'sake' to act for.
(Tooley,1983:99)

On Feinberg's view then, one of the conditions necessary for an entity's having some right is that it have interests. Tooley uses this observation of Feinberg's as a springboard for developing his own principles about rights and interests.

His first move is to "particularize", one might say, Feinberg's principle. He contends that ... "If [Feinberg's] justification of the interest principle is sound, it can also be employed to support principles connecting particular rights with specific sorts of interests." (Tooley,1983:99) Thus, Tooley's *particular-interests principle* should hold true:

It is a conceptual truth that an entity cannot have a particular right R unless it is at least capable of having some interest I which is furthered by its having right R.
(Tooley,1983:99)

In the domain of specific rights, then, it will be true that an entity, say, a fetus, would not have a right, for example, the specific right to life, unless it had an interest in continuing its life. Thus far, we might say that Tooley has determined that fetuses cannot have a right to life unless they are the kinds of things that can have an interest in continuing their lives.

I expected that Tooley would go on to show why it was that fetuses were not the kinds of things that could have such an interest and, hence, could have no right to life. However, at this

point Tooley changes tack to arrive at the conclusion. Thus far, he had been working from a conceptual analysis of rights as derived from interests, however, for reasons that are still unclear to me, he elects to approach now from an analysis of rights. He explains ...

Feinberg's defense of the interest principle involves an appeal to certain facts about rights, to the effect that 'a right holder must be capable of being represented', and 'a right holder must be capable of being a beneficiary in his own person.' If his argument is to be sound, these must in turn be conceptual truths. Perhaps they are. However, it seems that the argument should not rest with claims of this sort. What one would like is an argument based on an analysis of the fundamental notion of a right, and it is to such a line of argument that I now wish to turn.

(Tooley,1983:100)

Thus he will begin over to show that fetuses are not the kinds of entities that can have rights, this time from a conceptual analysis of rights themselves.

The account of rights that he chooses to analyze is one that views rights as related to conditional obligations. He selects passages from Stanley Benn and Richard Peters to illustrate the view and set the basis for his further reasoning. The two relevant passages are:

To say that X has a right to £5 is to imply that there is a rule which, when applied to the case of X and some other person Y, imposes on Y a duty to pay X £5 if X so chooses.

(Benn cited in Tooley,1983:100)

and

We can say, roughly, that to have a moral right to something is for *someone else to be morally obligated* (in the objective sense) to act or refrain from acting in some way in respect to the thing to which I am said to have the right, if I want him to.

(Peters cited in Tooley,1983:101)

The phrases, "... if X so chooses," and "if I want him to," suggest to Tooley that the obligations correlative to rights are "conditional upon what the person with the right chooses or wants." (Tooley,1983:101) And, without further ado, he formulates from this his initial account of rights:

'A has a right to X' is to be analyzed as equivalent in meaning to 'If A wants X, others are under a prima-facie obligation to refrain from actions that would deprive him of it.'

(Tooley,1983:101)¹

This account will not do, he claims, because there could be a sense in which it is true that a non-human animal, for example Puss, the cat, wants to go on living. If so, we have a prima facie obligation not to prevent her from doing so. Tooley believes that most people would object to the idea of Puss having a right to life. So, a revision is called for:

'A has a right to X' means the same as 'A is capable of wanting X and if A does want X, others are under a prima-facie obligation to refrain from actions that would deprive him of it.'

(Tooley,1983:101)

Tooley's moves here are most interesting and crucial to his further argument. For this reason, I would like to bring them into sharper focus.

¹It is not obvious that Tooley's principle here is equivalent in meaning to the passages from Benn and Peters. It seems that an equally plausible interpretation is: A has a right to X =_{df} Others have a *prima facie* obligation to refrain from actions that would deprive A of X unless A releases them from that obligation.

First, he interpreted the passages from Benn and Peters as connoting that the obligations that are correlative to rights are "conditional upon what the person with the right chooses or wants." He was talking here about obligations that may or may not be binding, depending on whether a right bearer chose to require them or not. This seems to me to mean: If A has a right to X then if A doesn't release others from their obligations, others have a prima facie obligation not to deprive A of X. –

Yet, Tooley's interpretation bears little resemblance to this. His initial formulation of a principle of rights is a biconditional, a definition:

'A has a right to X' is to be analyzed as **equivalent in meaning** to 'If A wants X, others are under a prima-facie obligation to refrain from actions that would deprive him of it.'
(Tooley, 1983:101; emphasis added)

Thus what began in Benn and Peters as the articulation of a simple feature of bearing a right now becomes a statement about the very nature of a right.

But Tooley thought that this "analysis of rights" was inadequate in that it would allow that animals could have a right to life. Thus, he quickly revised it. And, this second move is as interesting as the first.

He went from the original formulation: "A has a right to X iff if A wants X, others are under a prima facie obligation ... " to "A has a right to X iff A is capable of wanting X **and** if A does want X, others are under a prima facie obligation ... " (emphasis added)

This is no doubt a good way of excluding Puss et al from the domain of entities that could bear a right to life for, as we shall see, unless Puss is quite intelligent, she is incapable of wanting X where X is her continued existence.

The point that I want to make about Tooley's revision, however, has to do with his formulation of the consequent as a conjunction, viz. "A is capable of wanting X **and** if A does want X ... " In so doing he has effectively posited a necessary-condition for bearing a right; an entity, A, must be capable of wanting something in order for it to begin to have a right to it. And, presumably, if A cannot want X, no one has an obligation to let A have X.

The original formulation, with a conditional consequent, left open the possibility that others would have obligations towards A even if he did not want that to which he was entitled. And, it seems to me that this is more in line with what we want to say about rights. For instance, no one would say that we should not refrain from taking property inherited by an infant because the infant did not want it or that one's right to life is abridged if he is suicidal. someone

I would contend, then, that there are real difficulties in Tooley's final analysis of rights where the capacity to desire the object of the right is a necessary condition for having that right. In view of this, the "modified particular-interests principle" which he believes is entailed by this analysis stands on shaky ground.

Nonetheless, Tooley directs his inquiry into an analysis of the modified particular-interests principle, where he will determine necessary conditions for having the capacity to desire.

He singles out two features of desire that are relevant to the question of whether or not an entity has the capacity to desire. The first is that desires can be attributed only to creatures that are conscious and can have experiences. (Tooley,1983:103-4) He wants to rule out the possibility that an entity whose activities could be interpreted as desires would be thought to have genuine desires. For example, a simple machine designed to "search" for an electrical outlet when its batteries ran down, would not be thought to "desire" to be recharged. Hence, he concludes that ...

... however one analyzes such concepts as experience, consciousness, and desire, any satisfactory analysis of the latter concept will imply that only things that have experiences, only things that are conscious have desires.
(Tooley,1983:104)

The second feature of desire Tooley calls attention to is that "desires involve what many philosophers refer to as propositional attitudes." (Tooley,1983:104) He assumes that, properly construed, a desire must have as its object that a certain proposition be true. And, if it is the case that the objects of desires are truth values of propositions, it will follow that in order to have the capacity to desire, an entity will have to have certain conceptual capacities. Tooley puts it this way:

If desires involve propositional attitudes, an individual cannot have a desire unless he understands the proposition that he desires true. Understanding a proposition, in turn, presupposes possession of the concepts involved in it. To have desires, then, one must possess the related concepts.

(Tooley,1983:104)

The notion of being capable of having desires, in the end, turns out to mean that any individual that is to have the capacity will have to be a subject of experiences, be conscious and able to understand the concepts involved in the relevant propositions.

In the case of having a right to life then, it would appear that an entity had no right to life unless it were the subject of experiences, were conscious and could grasp the concept of itself as a living thing, or, to use Tooley's phrasing, not unless it possessed the " ... concept of a continuing subject of experiences, and [the concept of] [it]self as a subject of experiences." (Tooley,1983:105)

It is easy to foresee what conclusion will be drawn about the fetuses and their right to life. No fetus has the capacity to understand propositions about its continued existence; none possess self-concepts and, thus, no fetus can desire its continued existence. Zygotes, moreover are not thought to be subjects of experiences or even to be conscious. Hence, there is no question that on Tooley's understanding of rights, fetuses do not bear a right to life.

This is not the final version of Tooley's theory of rights, however. He spends some time responding to two objections to it and will modify his principle in light of them. It will be useful then to review the objections briefly.

The first is that a theory of rights that predicates obligations on what is in the bearer's interest is preferable to one that predicates them on his desires because it can accomodate counterexamples like the following. If rights were conditional solely upon desires, sleeping and comatose persons would have no rights but if they were

conditional on interests, these entities would have the rights we know them to have. If rights were conditional solely upon desires, infants' rights would not be violated if certain surgical procedures were performed upon them, (Tooley's example is of castrating newborn males to provide future soprano voices for the men's choir) but if rights were conditional on the infants' interests, the surgical procedure would be, correctly, a violation of their rights. If rights were conditional solely upon desires, it would be no violation of the rights of women to have conditioned them as children to be dependent helpmates, having no interest in intellectually challenging activities and so forth, but if rights were conditional upon interests, this would, as it should, turn out to be a violation of their rights. Thus, it seems that an account of rights as conditional upon the bearer's interests is more adequate than Tooley's version of rights as conditional upon desires.

In view of a rather ingenuous counterexample to theories of rights as correlates of desires or interests, set out by B.C. Postow, Tooley concedes that neither approach is adequate but some room must be made for the consideration that the obligations entailed by rights are conditional on whether or not the right-bearer has forgiven the obligations.²

²Postow's counterexample casts doubt on the adequacy of a theory based simply on interests or desires. The passage quoted in Tooley is: "One such sort of case is that where the right-holder fails to inform the obligated party of the fact that he no longer desires that to which he has a right. Suppose for example, that Hilda borrows £500 from Tom, with the promise to deposit a like sum in his bank account on June 1. Tom has a moral right to have this done, and Hilda a moral obligation to do it. On June 1, Tom is in a monastery in Tibet, desiring to cease the accumulation of material possessions and wealth. We may even assume that he has conceived this desire after careful consideration

But an adequate account of rights imply that obligations are conditional solely on whether they right-bearer has waived them or not, because in this case, Tooley observes, non-human animals would probably be incapable of having rights; as would fully conscious and intelligent human beings who could not communicate their thoughts or feelings to others. Further, the obligations due to minors do not cease simply because a minor has given someone permission to deprive him of the object of his right. –

In view of all of this, Tooley arrives at a formulation of a set of principles about rights that will accomodate all three factors: viz. that the obligations generated by rights will be conditional on desires, interests, and the decision to waive the obligation or not.

The last difficulty to "iron out" has to do with the rights of entities who do not *at a certain time* have the relevant desires or for whom the object of the right is not *at the time* in their interest. Recall the plight of sleeping or comatose individuals or of the would-be sopranos and Stepford wives. In all these cases, it seemed that people had obligations to refrain from treating them in certain ways because, at some time though not perhaps at present, they would desire the restraint or see it as in their best interests. Tooley thought some accomodation had to be made for this factor and allowed that where an entity, *at some time*, satisfied the necessary conditions for having a right, it would in the present time have the right in question.

of his true interests. He is unable, however, to communicate his new wishes to Hilda. Yet he still has a right to have the money deposited in the bank, and Hilda still has an obligation to deposit it." (Postow cited in Tooley,1983:113)

He casts the final revision of his analysis of the right to life as the following argument:

- (1) The concept of a right is such that an individual cannot have a right at time *t* to continued existence unless the individual is such that it can be in its interest at time *t* that it continue to exist.
- (2) The continued existence of a given subject of consciousness cannot be in that individual's interest at time *t* unless *either* that individual has a desire, at time *t*, to continue to exist as a subject of consciousness, *or* that individual can have desires at other times.
- (3) An individual cannot have a desire to continue to exist as a subject of consciousness unless it possesses the concept of a continuing self or mental substance.
- (4) An individual existing at one time cannot have desires at other times unless there is at least one time at which it possesses the concept of a continuing self or mental substance.

Therefore,

- (5) An individual cannot have a right to continued existence unless there is at least one time at which it possesses the concept of a continuing self or mental substance.

(Tooley, 1983:121)

By way of evaluation, I have already indicated dissatisfaction with Tooley's integration of the the capacity for desire into the analysis of rights.

Further, I would count as a weakness in the argument his dependence on a propositional account of desire. Certainly there is more to be said about desires than that their objects are the truth values of propositions. I am not prepared here to defend an alternative view but it seems that the non-propositional content of desire, the "raw feel" of it, must enter into an adequate account of desire and that if the logical behaviorist view has anything to it, "desiring behavior" should not be ignored. At any rate, the

assumption that desire requires a propositional attitude seems too hasty for the weight that it must bear in the argument.

A final and, I think, important point of concern is Tooley's introduction of the time factor, that an individual must at least *at one time* possess the concept of a continuing self. There is no doubt that he needs it to accomodate the counterexamples he lists. But, on the face of it, the time factor appears to generate an inconsistency in Tooley's overall view. The thrust of his entire argument has been to exclude fetuses as bearers of a right to life, primarily on the grounds that they lack the capacity to desire their continued existence. Yet, if the time factor is applied across the board, as it ought, fetuses would be perfectly good candidates for bearing a right to life, for, at some time, they most assuredly would desire to continue their existence.

The crucial question for Tooley here is whether or nor fetuses are the same entities as the later human beings who most assuredly would desire to continue their existence. Can we identify a fetus with a later entity in whose continued existence will be in its interest? Tooley provides an answer of sorts to the dilemma in a discussion of a case raised by Derek Parfit.

Imagine a human baby that has developed to the point of being sentient, and of having simple desires, but that is not yet capable of having any desire for continued existence. Suppose, further, that the baby will later enjoy a happy life, and will be glad that it was not destroyed. Can we or can we not say that it is in the baby's interest not to be destroyed.
(Parfit cited in Tooley, 1983:118)

Tooley's reply is illuminating. He takes seriously the contention that it must have been in the baby's interest that it not have been destroyed because the baby just *is* Mary when she was young. But the identification needs to be justified by such things as Mary's memories of the baby's experiences. If there were a sort of causal and psychological connection between Mary and the baby, it would be reasonable to say that they were the same subject of consciousness. But, lacking these, he believes it would be clearly incorrect to say that Mary and the baby were one and the same subject of consciousness. (Tooley, 1983:119-20) It would seem very difficult then to determine whether a baby will be the same subject of consciousness as a later adult before it is possible to quiz the adult about its memories and so forth. The situation will be all the more difficult with a fetus, for (I assume) it is a rarity that anyone would have intrauterine memories. Further, zygotes and embryos are not sufficiently developed to have conscious states at all & hence could not be the subjects of interests or be psychologically connected with a later human being.

What he has said about the desirability of having memories and establishing psychological connectedness to justify a statement of identity is true. But, once there is evidence of psychological capacity in a fetus, it is not unreasonable to suppose that there can be (and usually is) psychological connectedness with a later human being. Given this, it can be the case that at least later fetuses could have a right to life. Further, Tooley has said nothing about the significance of the physical continuity that holds between even

embryos and adults. Where memories are lacking, it seems that physical continuity could fill the gap to justify a claim of identity between at least later fetuses and adults. Hence, it is not unreasonable to say that a late term fetus is Mary when she was young and that it will at some time desire to continue its existence.

The consequence of all this for Tooley's argument is that it does not rule out the possibility that some fetuses have a right to life, viz. those that are continuous with later human beings that have a right to life.

Still, even this is being generous to Tooley, for his very analysis of rights as entitlements that are conditional on the bearer's desires is weak. It is fair to conclude that he has not shown that fetuses are not the kinds of things that can be the subjects of rights.

2.2 The Fetus' Rights as an Innocent Human Being

Among arguments offered by opponents of abortion, one of the most familiar is that based on the fetus' status as an innocent human being. Tooley reconstructs the argument this way:

- (1) An embryo or foetus developing inside a human mother is itself a human being, and an innocent one, from conception onwards.
- (2) It is seriously wrong to kill an innocent human being.
- (3) Abortion involves killing an embryo or foetus developing inside a human mother.

Therefore,

- (4) Abortion is seriously wrong.
- (Tooley, 1983:61-62)

Conservatives would have it that abortion is wrong just because it is an instance of killing an innocent human being, which is always seriously wrong.

Tooley assumes that premisses (1), (3) and (4) are uncontroversial.³ He will argue against the truth of (2), against the claim that it is seriously wrong to kill an innocent human being.

In order to follow Tooley's reasoning, it is necessary first to understand his distinction between basic and derived moral principles. Some principles, he observes, are true because they are implied by some more general principles and some empirical claims. For example, the principle that it is wrong to pull cats' tails is acceptable because it is implied by the more general principle, it is wrong to inflict pain upon some organisms, plus the empirical claim that pulling cats' tails causes them to experience pain.

The more general, or basic, moral principles are those not dependent on other principles and non-moral claims. (Tooley, 1983: passim 62-63)

Premiss (2) then could be either a basic or a derived moral principle. If it is a basic moral principle, Tooley writes, the way to show that it is not a good principle is to show counterexamples to it. If it is a derived moral principle, the way to refute it is either to provide counterexamples to the principle(s) from which it is derived or to show flaws in its derivation.

³For the sake of following Tooley's argument, we can assume for now that (1) is uncontroversial. But, of course, it is not. In the Aristotelian-Thomistic tradition, it is thought that a human being is not present in the womb until the fetus has developed a human form or is "ensouled." This argument is discussed in Chapter 4 below.

Tooley follows both strategies and concludes that (2) is neither a good basic moral principle nor a derived moral principle from which the wrongness of abortion can be inferred.

Using the first strategy, Tooley offers two counterexamples to the claim that it is seriously wrong to kill innocent human beings. The first is a case of human beings who have suffered brain damage such that the frontal lobes are destroyed, thereby destroying the neurological basis of consciousness, memory, personality, thinking etc. but where the brain stem is intact. In such human beings, basic bodily functions are still accomplished and they are considered to be alive. Yet, Tooley contends, it is not even *prima facie* wrong to kill such an individual. Thus, there is an instance in which it is not seriously wrong to kill an innocent human being.

The second counterexample is one of human beings who have suffered whole brain death and are maintained on respirators. Again, Tooley claims, there is no wrong in removing them from the respirators, thereby killing them.

It might be objected that this second counterexample will not do since whole brain death is a generally accepted criterion of death.⁴ Thus, removing someone from a respirator is not an instance of killing, for the organism is already dead. But, Tooley responds, the processes of growth, repair and reproduction of parts

⁴The Uniform Determination of Death Act posits the irreversible cessation of all functions of the entire brain, including the brain stem, as the criterion of death. This act has been adopted in sixteen states legislatively and in two others through explicit judicial recognition; statutes similar to it have been enacted in twenty other states and the highest courts in an additional four states have accepted neurological determinations of death without explicitly recognizing the act's formulation of the appropriate language to achieve this end. (Capron, 1987:6)

go on during respirator support and, for this reason, respirator support is analogous to the support given to other humans who are otherwise normal but need some sort of sustaining assistance, perhaps like that provided in kidney dialysis. Just as we say that the dialysis patient is still alive though they would die without the treatment, so we should say that the brain dead human is still alive though their vegetative life processes would cease without respirator support.

Tooley's attempt to sustain this counterexample is not clearly successful. There is significant difference between an otherwise normal patient who receives dialysis treatments and a brain dead human organism which can, with assistance, perform vegetative life functions. The difference and its moral significance will be part of the discussion of premiss (2) as a derived moral principle. But, it is not necessary to contest Tooley's reasoning on this point here. Let it be granted that a brain dead organism is an innocent human being that will be killed if it is removed from its respirator.

Tooley's first counterexample is much stronger and conservatives should concede it, for if they want to maintain that an embryo (which has less of a brain than a patient with only a functioning brain stem) is alive, they must allow that the patient is alive. Thus, removing a feeding tube and breathing tube from the patient would constitute killing an innocent human being. And, if Tooley's intuitions are true, such a killing is morally permissible.

However, given the current debate over cases just like this one, it is fair to assume that Tooley's intuition does not amount to an

obvious truth. All the votes are not in on the subject of the morality of discontinuing life support for patients with only brain stem function.⁵ Yet, I believe that Tooley is correct here for reasons to be given below.

Thus, premiss (2) is not a good basic moral principle. Is it a defensible derived moral principle?

To assess its worth, it will first be necessary to uncover the basic moral principle(s) from which it is derived. Tooley suggests that the way to do this is to find a class of actions which seem to be wrong for the same reason the actions we are considering are wrong. If there is such a class, he says, there must be some more basic moral principle that explains why actions in both classes wrong. (Tooley, 1983:67)

For instance, we are now considering the class of actions that have the property of being actions of killing innocent human beings. Tooley suggests that another class of actions that seems wrong in the same way is one of ...

... killing non-human animals that speak languages, have highly developed cultures, that have advanced further scientifically, technologically, and aesthetically than humans have, and that both enjoy sensations, thoughts, feelings, beliefs, and desires, and attribute such mental states both to us and to themselves.

(Tooley, 1983:67)

If these two classes of actions are wrong in the same way there

⁵For example, three years of controversy preceded the court's decision to discontinue life support for Paul Brophy who was maintained at New England Sinai Hospital in Stoughton, Mass. until the fall of 1986.

is a basic moral principle that implies both of them. It would be something to the effect of:

It is seriously wrong to kill entities that speak languages, have highly developed cultures, have advanced scientific, technological and aesthetic achievements, that both enjoy sensations and thought, feelings, beliefs, and desires, and attribute such mental states both to us and to themselves.
(Tooley, 1983:67)

Let us call this basic moral principle the *Bright Entities Principle*. As a basic moral principle, where it is joined by the true empirical claim that an innocent human being speaks a language, is cultured and so forth, it will imply that killing such an entity is seriously wrong. In the same way, it will follow that killing one of Tooley's very bright, innocent Martians is seriously wrong.⁶

The empirical claim that is needed to move from the *Bright Entities Principle* to the conservative's desired conclusion, however, is missing. Human fetuses speak no language, are not cultured, scientifically advanced ... thus, they do not come under the category of innocent beings that may not be killed.

Nonetheless, it is possible that the class of actions of killing innocent human beings is wrong because of another basic moral principle, one that applies to human beings but not to very bright Martians. It has to do with agent-relative reasons for not killing, that it is, for instance, more seriously wrong to kill one's parents or siblings than it is to kill others. We could call this principle the

⁶The *Bright Entities Principle* omits reference to innocent bright entities. I assume that this is an unintended oversight on Tooley's part.

Kinship Principle: It is seriously wrong to kill one's own innocent kin.

Add to this principle, the empirical claim that innocent fetuses, in virtue of their belonging to our species, are kin of ours, it will follow that it is seriously wrong to kill them.

Tooley is not convinced by this reasoning. He believes that biological relations, such as membership in the same species, do not constitute agent-relative considerations. (Tooley, 1983:69) He contends that the basis of our feelings about the wrongness of killing members of our families is not so much our biological ties to them but "shared experiences and social interaction over a period of time."

Here, though, Tooley is appealing to moral intuitions, intuitions that may not be universally shared. Adopted persons, for instance, often seek to establish ties with their biological parents, and I think it is not unusual for people to feel a moral obligation to help siblings or parents for whom they have little affection. One might even construe the sense of obligation expressed by certain Americans to support, for instance, the efforts of the Irish Republican Army or the state of Israel as expressions of kinship obligations. Someone might also cite the intuitions of judges and social workers who claim that biological parents have financial obligations to their minor children though they no longer live with them or even maintain any personal relations with them.

In view of this, it seems that Tooley's rejection of a *Kinship*

Principle is hasty and not warranted by appeal to current moral intuitions.

But the *Bright Entities Principle* and the *Kinship Principle* are perhaps not the only basic moral principles from which premiss (2) could be derived. An argument is frequently met with in "pro-life" literature, letters to the editor and such. And, although I have not seen it spelled out in great detail, I believe the following would be a good reconstruction of it. The argument would have premiss (2) above be a moral principle derived from a more general principle of justice. Let us call this principle the *Innocence Principle*: It is seriously wrong to punish any innocent being.

The derivation of premiss (2) from the *Innocence Principle* would run along these lines:

- (i) It is seriously wrong to punish any innocent being.
- (ii) Killing an innocent being is punishing it.
- (iii) Killing an innocent human being is an instance of punishing an innocent being.

Therefore,

- (iv) It is seriously wrong to kill an innocent human being.
- (v) A fetus is an innocent human being.

Therefore,

- (vi) It is seriously wrong to kill a fetus.

Premiss (i) is the basic moral principle. (iii) and (iv) will be acceptable if (ii) is true. But, (ii) is clearly not universally true. Killing an innocent being is not, in every instance, a case of

punishing it. For example, heroic suicides would not count as punishments though they are the killing of innocent human beings. The sorts of cases that Tooley mentioned above, of killing patients who suffer whole or frontal brain death and instances of elective euthanasia do not count as punishments of innocent human beings, yet they are examples of killing innocent beings. Therefore, one should say that killing innocent beings is not necessarily punishing them. Premiss (ii) is either false or true only in some cases.

There is a further reason, however, to say that the *Innocence Principle* is actually of no help to the conservative. This is because the conclusion that it is seriously wrong to kill innocent human beings will not apply to fetuses because, contrary to premiss (v), they are not innocent beings. Here is what I mean.

The notion of innocence means, minimally, "not guilty," that is to say, an entity that is innocent has not performed an illicit action. Now, it is true that in a sense things like stones and trees do not perform illicit actions because, first of all, they are probably incapable of acting and secondly, they are certainly incapable of moral sentiments. Thus, when we say that they are "not guilty" or "innocent", we use the terms metaphorically.

And, if we want to use "innocent" or "not guilty" literally, it seems to me that they must be predicated of moral agents, those who are capable of intentional behavior and whose actions can be guided by moral considerations.⁷

⁷Francis Wade will disagree with my understanding of action. He claims that something acts whenever it is "the causing of the cause" and that any agent that produces any change in itself or another "acts." (Wade, 1975:241) On this theory it would be true

In light of this then, it seems wrong to say that a fetus is an innocent being because zygotes and embryos, at least, are incapable of intentional behavior and the "actions" of later fetuses, if they are genuine actions, are undoubtedly not guided by moral considerations. The most appropriate thing to say about a fetus' morality, I would think, would be that it is amoral. Therefore, rules that apply to innocent (or guilty) beings would not apply to a fetus.

It is possible, though, that when conservatives appeal to the innocence of fetuses, they are in fact appealing to its helplessness. Perhaps the phrase, "it is after all just an innocent human being" means that, after all, a fetus is just a small, helpless thing and that, a woman, being much more powerful ought not destroy it.

Perhaps the moral principle that conservatives are appealing to is a sort of *Principle of Chivalry*: It is seriously wrong to take arms against weak and helpless human beings. This, in turn, would be derived from a more basic moral principle, a rough version of which could be the *Principle of Fair Play*: It is seriously wrong to take arms against a far weaker opponent, and the empirical claim that fetuses are much weaker than an adult woman.

But the *Principle of Fair Play* admits to counterexamples. If the far weaker opponent is in a position to kill you or enslave you or do you some serious harm and the only way you can escape it is to kill

that a fetus "acts" in that it produces a change in a woman or that a tree "acted" when it fell on my house and wrecked the roof. There is not room here to defend a theory of action; thus, I must concede that my view depends on a deeper theory of action that is not universally accepted. However, even if it were true that a fetus could act, its actions would not have moral dimensions since it is incapable of moral judgment or intentional behavior.

it then you may do so in self-defense. Chivalry no doubt demands that you try every other means of deflecting the harm before resorting to killing but if there is no other recourse I do not think it forbids you to save your life or well-being.

It would not be the case then that just because a fetus is weak and helpless that its life is inviolable though, out of a sense of fair play, one might say that it should not be destroyed except as a last resort.

An appeal to innocence, however, will not affect our obligations toward fetuses because, as we have seen, fetuses are not capable of performing innocent or guilty actions. But conservatives could with some justification claim that the agent-relative consideration of kinship counts against the morality of destroying fetuses.

Tooley then has been successful in that he has shown that human beings do not have moral standing just in virtue of their being human beings. His counterexamples of irreversibly comatose and totally brain dead humans are to the point. But he was too hasty in discounting the significance of kinship. And, there is some room, I believe, for appeals to rules of fair play for the protection of fetuses.⁸

⁸There are two further points worth considering regarding the *Principle of Chivalry* and the *Principle of Fair Play* that I have developed in behalf of conservatives. One is that they can easily deteriorate into appeals to pity and so may be suspect on those grounds and the second is that there are extremely few instances when they would come into play. I think the claim that the great majority of abortions are performed because the continued life of a fetus poses either an immediate or a later, predicatable, serious threat to the woman's well-being is a verifiable empirical statement.

2.3 The Fetus' Rights as a Potential Person

It is possible that the ethics of abortion will be decided on the basis of neither the fetus' kinship to us, its vulnerability nor its possession of a right to life. Tooley believes there is a third strategy which conservatives could use to show that abortion is seriously wrong. This argument is build on the alleged moral significance of a fetus' being a potential person.

Tooley's discussion of the argument has two parts. First, he provides a conceptual analysis of the notion of "potential person" and second, he offers four arguments to show that the destruction of potential persons is not intrinsically wrong.⁹ I will argue that his analysis of "potential person" is inadequate, that the definition of "potential person" he offers is but a straw man against which he addresses his four arguments. In view of this, it will be fair to conclude that Tooley's rejection of the potentiality criterion is unconvincing.

2.3.1 The Meaning of "Potential Person"

Tooley sees his task as one of providing a definition of "potential person" that will imply that human fetuses are potential persons. He asks:

⁹Tooley actually develops six arguments against predicating moral status on potentiality. However, he tells us that the first two, the "Identity cConditions and Potential Persons" argument and the "Persons Versus Potential Persons" argument are unsound. (Tooley,1983:196) Thus, for the sake of economy, I will discuss only the four he thinks are good.

How can the phrase 'potential person' be interpreted so that it will be true that biologically normal human foetuses are potential persons? (Tooley, 1983: 165)

It appears to him, however, that at least two of the ordinary interpretations of the phrase will not do because, under them, it turns out that fetuses are not potential persons.

The two definitions are:

Definition (i): S is a potential person =_{df} S will, in the normal course of affairs, develop into a person.

Definition (ii): S is a potential person =_{df} S will, if not interfered with, develop into a person.
(Tooley, 1983: passim 165-66)

The reason Tooley thinks that fetuses would not be potential persons under Definition (i) is that there it is possible to imagine a situation in which fetuses, in the normal course of affairs, do not develop into persons. The scenario he describes is one in which there is a widespread disease that causes the majority of pregnancies to miscarry. In such an environment, it would be true that "in the normal course of affairs" fetuses would not develop into persons because most of them die before they are even born.

Assuming, for the sake of argument, that the occurrence of such a widespread disease is "in the normal course of affairs", we can see why Tooley thinks it would be normal for a fetus not to develop into a person. In this rather abnormal environment, a fetus will probably

die and not develop into a person. He assumes that "normal" should be understood as "statistically average" so that where, on the average, fetuses do not develop into persons, they cannot be said to be potential persons.

But, this is not the only way to understand the term "normal" and it is not the way that someone who was trying to explain a conservative argument would use it. They would, I believe, choose the teleological sense of "normal" where for example, one says, "John has a normal heart," or "Jane has a normal liver or pancreas." In these cases "normal" means teleologically functional. Things that are normal in this sense are things that function in the way they are naturally supposed to function; they do the job they are designed to do.

Using this understanding of "normal" in the analysis of "potential person", we would say that S was a potential person if and only if S had as a natural *telos* or goal developing into a person, or, more generally, if and only if it was part of S's nature to develop into a person. And, since it is part of a human fetus' nature to develop into a person, it is reasonable to say that under Definition (i), it is a potential person.

Under Definition (ii), something is a potential person only if it will develop into a person if it is not interfered with. Tooley contends that not interfering with fetuses is not enough for them to develop into persons. He observes that fetuses "... must also be supplied with nutrients and other things, if [they are] to survive and develop into ... persons[s]." (Tooley, 1983:166)

The intuition he is trying to capture is one that is often expressed as the difference between having active or passive potentiality. In the former case, an entity is said to have [active] potential for P if it, itself, does something to bring it about that it acquires P. In the latter case, an entity is said to have [passive] potential for P where something can happen to it such that it will acquire P.¹⁰ Tooley expresses the distinction this way:

An entity may be said to have an active potentiality for acquiring some property P if there are within it all of the positive causal factors needed to bring it about that it will acquire property P, and there are no other factors present within it that will block the action of the positive ones. ... it has passive potentiality for acquiring property P if other things could act upon it in such a way as to bring it about that it acquires property P.
(Tooley, 1983:167)

Ordinarily, when it is said that an entity has potential for acquiring a property P, one means that it has an active potential. For example, if it were claimed that Louis had potential to become a brilliant pianist, we would think that Louis could, by practicing and attending to his teacher's advice (if he has a teacher), bring it about that he becomes a virtuoso. We would not say that Louis had potential to become a brilliant pianist if special pianos had to be built for him to play well or if he would need to have Listz's brain and hands transferred to him in order for him to succeed.

A fetus cannot, by itself, bring it about that it would develop into a person. Some things must be done to it if it is to succeed, namely,

¹⁰ I am paraphrasing an explanation of the distinction between active and passive potency given by the conservative writer, Francis C. Wade in his paper, "Potentiality in the Abortion Discussion" (Wade, 1975:239).

nutrients and shelter must be supplied to it. Thus, Tooley feels that it has a passive potential for becoming a person rather than an active one.

He is certainly right that a fetus cannot grow and develop without support and protection and it is also true that where an entity has but passive potential for acquiring a property P, one would say that it was a potential P. But I would take issue with the sharpness of his distinction between active and passive potency. It seems to me that there are gradations of potentiality and that "active" and "passive" potential are more like the opposite ends of the scale than two distinct kinds of potentiality. Consider again Louis. Were he a child prodigy in need of no tutoring, he would clearly have active potential for virtuosity; if he needs bizarre surgery and special instruments, he clearly has only passive potential for it. But, there are all the grades between these two extremes over which Louis would be considered to have more and more potential for virtuosity. Perhaps he would benefit from training with a more experienced musician; perhaps he needs that training to develop his brilliance; perhaps he needs much training for this. It seems to me that the line between his developing into a brilliant pianist on his own at some point blurs into his developing into one only if someone does something to him and I do not think it would be false to say that he had active potential if he needed some instruction or, to be absurd, if he needed to have a some sheet music or a piano stool or even a piano itself.

There is another reason that Tooley should not put much weight

on this distinction. That is that if he holds to it as strictly as he has done he will end up with the very odd conclusion that no living thing has the active potential to acquire any property. It is never enough not to interfere with natural or planned or chosen activities; each living thing must receive air and light, support and shelter in order even to stay alive much less do great things.

Human beings of course must receive "assistance" from their society and natural environment. We cannot exist outside of our "global womb." And, I do not think that the support that anyone receives from society or the natural environment counts against their having active potential for acquiring any number of properties.¹¹

In the same way, it seems that the life support a fetus receives is not of the kind or amount that would warrant our saying that it had but passive potential for becoming a person. I am not sure exactly where the line would be drawn when we would want to say this - perhaps if a fetus needed radical surgery - but certainly not if all it needed was the ordinary support provided by the pregnant woman.

In view of all of this, Tooley's observation that strict non-interference is not enough for a fetus to develop into a person is not very interesting. He has put too much weight on the not-very-clear distinction between active and passive potential and failed to take

¹¹This is not to say that there is a bright line between the "natural" support or "ordinary" support that would not preclude the presence of active potential and the "extraordinary" support that indicates only the presence of passive potential. The difficulty in deciding which medical procedures shall be "ordinary" means of maintaining life and which ones "extraordinary" is a case in point.

into account that some degree of life support is needed for any endeavor and that receiving it does not take away from an entity's having active potentialities.

On Definition (ii) then, fetuses can be potential persons. They would also count as potential persons under Definition (i). Therefore, there was actually no need for Tooley to formulate a new definition of "potential person." But he thought he did and so offered a new one to remedy the deficiencies of Definitions (i) and (ii).

2.3.2 Why Potential Persons Lack Moral Standing

According to Tooley,

X is a potential person if and only if X has all, or almost all, of the properties of a positive sort that together would be causally sufficient to bring it about that X gives rise to a person, and there are no factors present within X that would block the causal process in question. (Tooley,1983:168)

The new definition is interesting in a number of ways. There is an allowance, as it were, for the fetus' need for life support in the phrase, "... or almost all, of the properties" which would address his difficulty with Definition (ii). Unfortunately, it provides an uncomfortable vagueness to the definition. The last clause, "... and there are no factors present within X that would block the causal process in question." has the predictable effect of ruling out fetuses with congenital defects that will prevent their developing the properties necessary for having a right to life. This is reasonable since it would make little sense to say that something that could

never become a person was at some time a potential person. The introduction of the phrase " ... causally sufficient to bring it about that **X gives rise to** a person" however is puzzling. I cannot guess why Tooley abandoned the traditional " X develops into a person" in favor of "X gives rise to a person." But this is the best definition he can generate in behalf of conservatives and it is the one he will use in his subsequent reasoning.

Tooley supposes that there are three possible reasons why conservatives might believe that it is wrong to destroy potential persons:

- a. because potential persons have a right to life,
- b. because potential persons are intrinsically valuable objects
- c. because the destruction of potential persons is intrinsically wrong and seriously so.

(Tooley,1983:173)

He rules the first one out because of reasons that he gave above that would show that potential persons are not the kinds of entities that could bear rights. He thinks conservatives would not argue from the second claim because while it provides a reason for not destroying potential persons, it also provides a reason for bringing them into existence. And, it seems to Tooley, that conservatives would prefer not to argue in behalf of a prima facie obligation to propagate. Hence, the best strategy for them would be to defend the third claim.

As a note in passing, it can be observed that Tooley's assumption about conservatives' rejecting the second claim is probably unwarranted. Arguing in behalf of a prima facie duty to propagate

may not be as unthinkable as he supposes. After all, prima facie duties become actual duties only when they are not over-ridden by more serious prima facie duties. Hence, saying that one has a prima facie duty to propagate only means that, if there are no more serious reasons why one should not propagate, well, then, one ought to do so. But, there are all kinds of serious reasons one might appeal to which would leave the prima facie duty to propagate either nullified or very low on the list of duties to be honored. And, one might add, there may well be little disagreement between liberals and conservatives about which reasons are strong enough to defeat the prima facie duty to propagate.¹²

Thus, Tooley need not have dismissed the claim so hastily. It deserves more serious consideration. But, having assumed its indefensibility and believing that he had shown the falsity of the first claim, he elects the third for his reconstruction of a conservative argument.

By Tooley's lights, the sustaining premiss of the conservative's argument from the fetus' status as a potential person is: The destruction of potential persons is intrinsically wrong and seriously so. Let us call this the *Potentiality Claim*.

¹²Also, the assumption that if X is intrinsically valuable, there is a duty to produce Xs is not obviously true. It is a corollary of utilitarian theory where utility is taken to be the only intrinsically good thing and there is an obligation to maximize utility. However, outside of utilitarian theory, there seems to be no reason to suppose that because X is intrinsically valuable, there is any obligation to produce more Xs. Consider the possibility that something is intrinsically valuable if, among other reasons, it is a rare or unique object. In such a case, we would want to preserve its uniqueness not negate it by producing more Xs.

Before looking at the four arguments Tooley offers against the conservative view, it will be helpful to "unpack" the *Potentiality Claim*. We already have an understanding of Tooley's concept of a potential person. The destruction of a potential person, then will mean, roughly, "affecting a potential person in such a way that it would never come to possess the properties of personhood." Thus, for example, destroying the frontal lobes of a fetal brain while leaving the stem intact would count as destroying a potential person as much as aborting a fetus altogether (Tooley, 1983: passim 162).

Next, the concept of an action being intrinsically wrong bears clarification. Tooley does not say just what he means by something being intrinsically wrong and seriously so. One would suppose that he means something that generally corresponds to the notion of intrinsic value, for example: X is intrinsically wrong =_{df} X is wrong in and of itself. That is to say, X would be judged wrong irrespective of the circumstances in which it was performed or of any consequences which would follow from its performance.

On the face of it, the notion of intrinsic wrong is reasonable enough. Both deontologists and consequentialists could accommodate the concept in their respective theoretical frameworks. But, while deontologists may cite a number of intrinsically wrong acts, e.g. failing to treat persons as ends-in-themselves, breaking promises and so forth, consequentialists have only one action which they would say is intrinsically wrong and that is an action that fails to produce the best state of affairs. For consequentialists, being an intrinsically wrong act means being an act that produces a less-than-best state of affairs.

This being the case, it is difficult to see how most, if any, consequentialist thinkers could accept the truth of the *Potentiality Claim*. It would be tantamount to saying that in every instance, destroying a potential person would fail to generate the best state of affairs. Certainly hedonists, egoists and act utilitarians would take no stock in such an assertion. And, it is doubtful that even a rule utilitarian would be tempted by it.

Unfortunately then, for anyone who seriously wanted to defend the *Potentiality Claim*, the consequentialist audience will, already, have been lost, a priori, as it were. The claim will be unintelligible to most, if not all, consequentialists.

However, should there be a contingent of non-consequentialist thinkers who were willing (i) to accept Tooley's vague characterization of "potential person", (ii) to agree that defending a prima facie duty to propagate was a futile task and (iii) to defend the claim that destroying potential persons was intrinsically wrong (but not on the basis that potential persons have a right to life), then, for these tenacious few, Tooley's four arguments against the *Potentiality Claim* he attributes to conservatives may hold some interest.

The four arguments are developed from: I. The Unrestricted Potentiality Principle, II. The 'Almost Active Potentialities' Principle, III. The Moral Symmetry Principle, and IV. The Moral Comparability Principle.

I. The Unrestricted Potentiality Principle (UPP)

Tooley develops the argument based on UPP in two stages. First, he observes that conservatives' understanding of the notion of potential personhood is quite restricted. That is to say, when conservatives form principles about potential persons, they, in fact, restrict them to biologically unified entities that satisfy the conditions of potential personhood. They leave out, for example, entities which are electronically or mechanically organized.

Now, Tooley reasons, if principles about biologically unified potential persons are acceptable, they will be so only if unrestricted principles about potential persons are acceptable. Thus, if destroying a biologically unified potential person is intrinsically wrong, it is so because destroying any potential person is wrong, regardless of its mode of organization. In view of this, he suggests a reading of the *Potentiality Claim* called the "Unrestricted Potentiality Principle":

The destruction of a potential person is intrinsically wrong and seriously so, where X is a potential person if and only if X is an entity, or a system of entities, that has all, or almost all of the properties of a positive sort that together would be causally sufficient to bring it about that X gives rise to a person, and where there are no factors present within X that would block the causal process in question.
(Tooley, 1983:179)

The concept of potential person is now enlarged to include mechanical and electronic systems that through some process or another will "give rise" to a person.

I confess a certain amount of uneasiness with this expanded view

--- not so much with the notion of mechanical or electronic persons, as with that of a potential person being a system that "gives rise" to a person. It is reasonably clear how a human embryo or fetus "gives rise" to a person. It, itself, following a genetic program, as it were, gradually matures until it becomes a person, i.e. according to Tooley, until it becomes capable of understanding sentences about its continued existence over time. But, what would it mean for an electronic or mechanical system to "give rise" to a person? Must the system become a person? Or, will it be sufficient that it provide conditions under which one of its parts becomes a person? Tooley provides no answers to such questions nor is it any clearer now than it was earlier why he introduced the notion of "giving rise" to a person rather than retain the more attractive notion of "becoming" a person.

Nonetheless, he makes full use of the term in developing a counterexample to UPP. He asks us to consider a futuristic machine that can bring together human sperm and ova and then sustain the life of a resulting organism until it becomes capable of independent existence. The machine, in view of its capacity to give rise to a person is to be considered a potential person.

Next, Tooley asks us to contemplate the action of cutting the conveyor belt that carries the sperm - which now languish and die. He claims, rightly, that few people would consider this action to be intrinsically wrong and seriously so. Thus, if it is morally permissible to cut the conveyor belt, it is morally permissible to destroy a potential person, and, so UPP is false. Ergo, the

conservatives' argument fails.

I think not. It makes little sense to say that a functioning conception machine joined to an artificial womb is, itself, a potential person. Tooley is here capitalizing on the vagueness of the term "gives rise" to a person. I would suggest that the term is inappropriate and misleading in a discussion of potentiality and since Tooley has not justified its introduction, I see no reason to substitute it for the usual, "becomes" a person.

Further, even with the notion of "giving rise" to a person, Tooley's counterexample will not work because the "baby-making-machine" does not have active potential for giving rise to a person. Tooley claims that the system does have active potential for giving rise to a person, unlike a human fetus, because it "requires nothing beyond the absence of interference" to yield a person. (Tooley, 1983:182) But he is wrong on this score because mechanical and electronic devices need to be "plugged in" or "cranked up", i.e. they need some outside energy sources in order to run. Hence they need more than "non-interference" to yield a person and so are no more a potential person than a human fetus.

But of course, they are less of a potential person than any human fetus. Systems that give rise to persons are not, themselves, potential persons. No one, pace Tooley, would agree that just anything that could occasion the existence of a person is, itself, a potential person. If such were the case, primeval slime or the entire universe, for the matter, would be potential persons, which is absurd.

II. Almost Active Potentialities (AAP)

In this argument, Tooley attempts to capture the intuition that there is not much difference from a moral point of view between entities that are very close to being potential persons and those that are a bit farther away from it. He thinks most people would deny that there is any sharp moral difference between things that almost have active potentiality because one is slightly closer to achieving it than the other.

For example, he suggests that a system consisting of a normal woman and a collection of spermatozoa, let us call it "WS", though it is somewhat farther away from giving rise to a potential person than a system consisting of a human zygote and its maternal support system (let us call this system "ZM"), ought to have much the same moral status as the second system, ZM.

Assuming that WS and ZM have much the same moral status, we may further note that since it would not be seriously wrong to destroy WS (contraception is not, after all, usually thought to be seriously wrong), it would not be very seriously wrong to destroy ZM, at least not much more seriously wrong than destroying a system like WS.

As in the case above, it still does not make sense to talk about systems that give rise to persons as though they were entities that developed into persons. Thus, I would contend that neither WS nor ZM is a potential person.

But even allowing for this, Tooley's example here does not

illustrate his point. WS is not a system; it is a set that includes a woman and a collection of spermatozoa. Until there is some purposeful interaction among the elements of the set, it cannot properly be called a system. Tooley would have done better to have compared a zygote and its maternal support system with that of a fetus with its support system.

It would have helped if he had done this but it would not have erased the difficulties generated from claiming that a system that gives rise to a person is itself a potential person.

III. The Moral Symmetry Principle (MSP)

For this third argument, Tooley develops a moral principle, MSP, which he believes contradicts the *Potentiality Claim*. The "Moral Symmetry Principle is:

Let C be any type of causal process where there is some type of occurrence, E, such that processes of type C would possess no intrinsic moral significance were it not for the fact that they result in occurrences of type E

then:

The characteristic of being an act of intervening in a process of type C that prevents the occurrence of an outcome of type E makes an action intrinsically wrong to precisely the same degree as does the characteristic of being an act of ensuring that a causal process of type C, which it was in one's power to initiate does not get initiated.

(Tooley,1983:186)

Thus, if an action, A, has the characteristic of being an action

which disrupts a process C which results in E and is intrinsically wrong to x° then an action, B, which has the characteristic of failing to initiate a process c which results in E is intrinsically wrong to x° .

The plausibility of MSP derives, I believe, from a consequentialist understanding of the morality of actions. E is to be understood as a best state of affairs, C as a process which leads to it. To act in such a way as to prevent the occurrence of E would then be intrinsically wrong.

Bearing this in mind, it becomes plausible to say that there is a "moral symmetry" between actions which have the characteristic of preventing E by interrupting C and those that prevent E by failing to initiate C. They are equally wrong because they equally result in the prevention of E.

A number of objections have been raised against MSP on the grounds that the morality of actions cannot be weighed solely on the basis of one common characteristic. Actions, typically, have more than one characteristic, some of them wrong-making, some of them right-making, and some of them morally neutral. Determining the comparative morality of two actions involves an assessment of all of their morally relevant characteristics. Thus, for example, if A were to be more difficult to perform than B, their morality might differ, or if A were intentional and B was not. Or, again, if A had the property of being a promise-breaking action and B did not, our judgment about them would differ. Therefore, one could object to MSP on the grounds that it is unintuitive. Actions typically have

several morally salient characteristics, so a principle that compares morality on the basis of just one characteristic is not helpful.

Tooley clearly acknowledges this type of objection. (Tooley,1983: passim 187-90) But he maintains that his interest is in a principle that is a claim about wrong-making characteristics alone and not in one that is a claim about action that possess certain characteristics that are generally wrong *all things considered*.

One wishes that Tooley had done more than acknowledge the objections. It would have been helpful had he explained why they are apparently irrelevant.

Tooley might defend his interest on the grounds that if someone wants to discover a relation between two factors, all other variables must be kept constant. In this way, one would be assured that what was learned was about the factors in question. I believe this is, in fact, what Tooley had in mind for at the end of his analysis of some objections to MSP, he writes:

There is a way in which one can reduce the initial appearance of counter-intuitiveness that the moral symmetry principle has for many people. That is by explicitly building into the statement of the principle reference to other morally significant factors that may be present in typical cases, and which may make a difference in the wrongness of two actions. Thus, one might specify that the motivation should be the same in the two cases, that the action should involve no risk, and minimal expenditure of energy, that the actions should have no further consequences, and that the actions should be intentional.

The advantage of this type of formulation, which I have adopted elsewhere, is that it explicitly draws attention to factors that must be kept constant in evaluating the principle.

(Tooley,1983:190)

What we have then with MSP is a principle for assessing the comparative moral weight of two characteristics of actions where all other morally relevant characteristics are taken to be on a moral par. Given these parameters, we should concede that MSP is not so counter-intuitive after all. But, is it interesting?

The qualifications Tooley has built into it make it virtually sterile as a working moral principle. For two human actions to be morally identical in all but one characteristic is, practicably, impossible. Thus, while MSP may have some purely theoretical merit, as a moral principle about actual human actions, it is unhelpful. It has, I would say, died the "death of a thousand qualifications."

Aside from this, what can be said about MSP as a theoretical contradiction to the *Potentiality Claim*?

It is difficult to see how MSP could contradict the *Potentiality Claim* because MSP is about interrupting, i.e. destroying, a process, C, whose moral value is derived from its causal relation to a resulting good, E. Now, unless Tooley believes that the process that leads to E is a potential E, he is talking about something different than what is asserted in the *Potentiality Claim* which is about potential persons. MSP is about a process that leads to something good, presumably the existence of a person. Thus, if MSP is to have any bearing on the argument under consideration, we will have to assume that the gestational process is a potential person. This is a tough assumption to make.

However, since Tooley thinks that systems can be potential persons and that collection of things can "almost" be potential

persons, it may not be too farfetched for him to say that a gestational process is also a potential person. It does, after all, "give rise to a person."

Let us assume, then, that Tooley does think that the gestational process is a potential person, that it is a process that has moral significance only because it brings about something that is morally significant, a person. Does MSP contradict the *Potentiality Claim*?

That depends. As noted above, MSP's plausibility derives from a consequentialist understanding of morality. That is to say, MSP's credibility depends on the truth of a consequentialist ethical theory that would measure the morality of actions exclusively on their outcome. But, we have also seen that no consequentialist would defend the *Potentiality Claim* as a good moral principle. (cf p. above) Hence, to show that the *Potentiality Claim* is falsified by MSP is less than interesting for consequentialists who denied it in the first place.

This objection may not be important because if the *Potentiality Claim* is the sort of claim that would be advanced by deontologists, one would want to argue against it in a manner interesting to them. But MSP is ill-suited for the task because it is a consequentialist principle. No deontologist would think that a process could have intrinsic moral significance because of its outcome. They would say that if a process had *intrinsic* moral significance it would be precisely for reasons other than its outcome. Therefore, for deontologists, MSP begs the questions against a deontological understanding of intrinsic value.

All told, an argument against the *Potentiality Claim* that is based on MSP appears to have little chance of success. Because it is so extremely qualified, it will be uninteresting to those who require moral principles to be useful for making actual moral decisions. What will it matter if MSP contradicts the *Potentiality Claim* since the probability that there could, in actuality, be two actions which differed only in the respects stipulated by MSP is nil.

Further, for MSP to begin to do its work, it must be assumed that the human gestational process is a potential person. Such an assumption could make sense only if Tooley's characterization of potential persons were well-founded, which it is not. And, drawing the inquiry even further, we see that MSP is plausible for consequentialists but uninteresting as a contradiction to the *Potentiality Claim* for no consequentialist would accept the truth of the claim in the first place. And, deontologists who might defend it would reject MSP because of its consequentialist interpretation of intrinsic value. It becomes for them an instance of begging the question against their moral theory. In the end, then, MSP fails to provide a good reason for rejecting the *Potentiality Claim*.

IV. The Moral Comparability Principle (MCP)

The Moral Comparability Principle is a variation of the Moral Symmetry Principle, "similar to, but more modest than, the basic moral symmetry principle." (Tooley, 1983:194)

Tooley formulates MCP to ease doubts about MSP that could arise from a belief that an action of failing to save someone is less seriously wrong than that of killing someone.

Recall that according to MSP the moral quality of a pair of actions that have the same outcome is the same. But if this were true, it would seem that it would be as moral (or immoral) to fail to save someone as it would be to kill someone because the outcome of both actions is the same, viz. the death of a person. Yet, some thinkers believe it is more seriously wrong to kill a person than it is to fail to save one.¹³

Tooley tries to make an allowance for the difference of opinion by suggesting that someone who thought it was more wrong to kill a person than to fail to save one might very well accept the following principles:

(1) Failing to save someone is, in itself, almost as seriously wrong as killing.

(2) Killing and failing to save are comparable in the technical sense of there being some number n such that failing to save n people is, in itself, more seriously wrong than killing one person.

(Tooley, 1983:194)

Assuming that the weaker principles will be acceptable, Tooley formulates a "toned down" version of MSP, the Moral Comparability Principle:

¹³For example, the basis of Baruch Brody's argument against Judith Thomson's view is that the case of the dependent violinist is not comparable to that of a fetus because detaching oneself from the violinist is an action of letting him die while aborting a fetus is an action of killing it. He assumes that the lack of "moral symmetry" between the two will be obvious. (Brody:1972)

Let C be any type of causal process where there is some type of occurrence, E, such that processes of type C would possess no intrinsic moral significance were it not for the fact that they result in occurrences of type E.

Then:

There is some number n such that the characteristic of being an act of ensuring that n causal processes of type C, which it was within one's power to initiate, do not get initiated, makes an action intrinsically wrong to at least as great a degree as does the characteristic of being an act of intervening in a process of type C, thereby preventing the occurrence of an event of type E.

(Tooley, 1983:195)

Given MCP, we can proceed as with MSP concluding that there is some number n such that intentionally refraining from bringing n persons into existence is morally comparable to destroying a potential person. And, since it is not seriously wrong to refrain from bringing into existence n persons, it is not seriously wrong to destroy a potential person.

Tooley at this point, acknowledges a likely objection to his proposal based on the quality of the lives of the potential persons involved. Someone might say for instance, that where it was the case that if n persons were created they would lead happy lives and the potential person would lead an unhappy life, it would be more seriously wrong to fail to bring n persons who will be happy into existence than to destroy a potential person who will be unhappy.

In view of this, Tooley concedes that MCP must be modified to accommodate the objection but he maintains that it will still be a strong objection to the conservative view that rejects the claim

that the quality of the future person's life is irrelevant to the morality of destroying it.

I think that in spite of Tooley's generosity in weakening MSP to accomodate doubts about the moral equivalence of killing and letting die, those who do see a moral difference between the two actions would not accept MCP. Both MSP and MCP are clearly consequentialist principle and will be rejected by moral theorists of other persuasions who will, for the most part, be those inclined to defend a conservative view.

Further, MCP like MSP, is open to the criticism that it rests on the unintelligible assumption that the human gestational process is a potential person.

Tooley's discussion here, however, touches on an interesting and important issue, that is, of the moral comparability of killing and failing to save. One need not depend on consequentialist principles to argue that the boundary between the wrongness of the former and the permissibility of the latter is not very clearly defined.

But the point I would like to make here is that regardless of how one decides on principles about killing vs. failing to save, there will rarely be need to call upon those principles for questions about the legitimacy of elective abortions. In the vast majority of cases, fetuses do not need to be "saved" from anything. They are not under any threat to harm. Thus, appealing to distinctions between killing and failing to save (or the lack thereof) in order to justify abortion is unreasonable.

Such principles would come into play in cases where a fetus would die or come to harm if it did not receive medical assistance

or if the pregnant woman did not refrain from behavior that endangered it. In such instances fetuses would be threatened and perhaps the failure to save them would not be morally equivalent to killing them in a standard abortion procedure. Perhaps it would.

But, this is irrelevant to the question of the morality of destroying fetuses in elective abortions. Unless a fetus (or, for the matter, any living thing) is in danger, it makes no sense to ask whether not saving them is tantamount to killing them. One cannot *fail to save* something that is not in danger in the first place.¹⁴

Thus, although it was generous of Tooley to attempt to accomodate misgivings about the distinction between killing and failing to save, his efforts were really irrelevant to the issue at hand.

The view that abortion is wrong because it destroys potential persons is unquestionably one that is espoused by many conservatives. Tooley's discussion of it is challenging and illuminating in several ways. And, at the same time, it is woven with difficulties.

The first and most serious of them is his understanding of potentiality, especially that of potential personhood. His

¹⁴Consider, for example, the state of affairs where Professor Jones is gazing contentedly out of his window at the old campus chapel made lovely by surrounding fall foliage when he is brutally shot by an irate but articulate student of ethics who claims that his act was probably permissible because there is no clear moral boundary between failing to save Jones and killing him. Certainly killing someone who is not in danger cannot be construed as even morally comparable, much less symmetrical, to failing to save someone.

characterization of active potentiality as the ability of an entity to acquire a property without any support or assistance whatever is mistaken. Above and beyond non-interference, a certain amount of assistance and certainly that of an environmental support system is allowed to potential property bearers. There may indeed be a cut-off point where one would want to say that, where so much assistance was required to get S to acquire property P, S really had not much, if any, potential for P. But assistance in the form of oxygen, nutrition and shelter do not begin to count as such excessive helps.

In view of his conclusions about active potentiality, Tooley developed a characterization of potential persons as entities that have almost all the properties needed to *give rise to* a person. These vagaries were capitalized upon in the arguments he offered against the proposition that it is intrinsically wrong to destroy potential persons, and, so I have claimed that his unwarranted and admittedly vague definition of "potential person" became but a straw man against which to argue the inadequacy of the *Potentiality Claim*.

Tooley's difficulties are also at a more basic level. It becomes clear from the principles he offers that he is a consequentialist moral thinker. The moral intuitions he finds plausible are certainly so - if you are a consequentialist. What Tooley fails to appreciate is the deep difference of perspective between himself and someone who would seriously defend the *Potentiality Claim*. Such a person, presumably a deontologist in the natural law tradition, could make no sense of Tooley's principle.

Thus, one very good thing to come out of reading Tooley is an

understanding of how deeply rooted may be the difference of opinion between liberals and conservatives. One begins to suspect that the difference is fundamentally a difference in ethical theories held. And, should this prove true, the end of the abortion debate will be no nearer in sight than that of the end of the consequentialist-deontologist or utilitarian-natural law disagreements.

Another feature of the abortion discussion that surfaces here is what one might call a difference of moral ontology. Thinkers like Tooley are prepared to accord the same moral status to future states-of-affairs, possible entities, as they are to actual entities. This would conflict with views of people who would give preference to entities that actually exist, that are continuants rather than possible states-of-affairs or to entire processes. There is a hint that the differences at work here go down even to the deep structures of ontology.

In its way, then, Tooley's work on this conservative argument is very helpful. Nonetheless, because of his mistaken understanding of potentiality and potential personhood, the arguments he offers fail to defeat the *Potentiality Claim*.

2.4 Conclusion

There is good reason to conclude that Tooley's forceful and perceptive line of argumentation does not enjoy the success he expected. He has not shown definitively why the conservative's claim that all fetuses have moral standing is unjustified.

But he has argued against the right premisses. Having a right to life, being an innocent human being and being a potential person are as strong reasons as anyone could give for saying that an entity "counts." And his strategies are potentially effective. There is, after all, no point in arguing for or against a fetus' right to life if it is not even the kind of thing that can have rights at all. It will not be helpful to claim that a fetus ought not be destroyed because it is an innocent human being if there is nothing morally significant about being a member of the species *homo sapiens* in the first place and if the term "potential person" is so broad as to include processes that give rise to persons, it will not serve as a basis for asserting the moral status of fetuses because they are potential persons.

As we have seen, however, the theory of rights that Tooley develops to substantiate the charge that fetuses are not the kinds of things that can bear rights is not plausible. There is trouble in moving from a description of rights as conditional upon interests to rights as conditional upon desires. Further, his understanding of desire as conditional upon propositional attitudes seems misguided or at least premature. Finally, his attempt to accomodate the intuition that rights ought not be conditional on desires that are held only at certain times in a right-holder's life (e.g. when he is awake or grown up or free of previous "conditioning") led him into an apparent contradiction. He qualified his original theory by adding that S would have a right to life if and only if S could *at some time* in its life desire its continued existence. It seemed that fetuses, later in their lives, would desire to continue existing and that, in

virtue of this, they should now have a right to life, which Tooley denies.

This last point carried Tooley into the need to justify his belief that a fetus and a later human being were not the same subject of consciousness. He reasoned that later human beings do not remember things that happened to the fetus and that no causal connections could be discovered between the states of consciousness of fetuses (if they have any) and those of later human beings. Hence, they could not properly be said to be the same subjects of consciousness.

I suggested that once a fetus had the capacity for intentional behavior, once it had a "psychology", it might be reasonable to say that there was a "psychological connectedness" between a fetus and a later human being. I thought also that the physiological continuity that held between the two might substitute for the absence of intrauterine memories - at least enough to say that there was a good (though not excellent) basis for asserting a claim of personal identity between a fetus and a later human being. The issue of whether a fetus is the same being, the same subject of consciousness or the same person as a later human being is an interesting one and will come to the fore again in the discussion of the conservative view in Chapter 4 below. Its resolution is not crucial here because the difficulties with Tooley's theory of rights are enough to vitiate his attempt to show that fetuses cannot have a right to life.

His reasoning about the significance of being an innocent member of *homo sapiens* was more fruitful. He showed that the *Innocence*

Principle was not a good basic moral principle because it is not wrong to destroy every innocent human being. Those that are brain dead or have only a functioning brain stem are cases in point. It appeared though that the *Innocence Principle* could be a worthwhile derived moral principle either as derived from basic principles about the wrongness of destroying one's kin or about fair play. The issue of fair play, i.e. the permissibility of destroying a much weaker opponent would probably rarely be relevant to the question of destroying fetuses but there is need to discuss the implications of the fetus' relation to the pregnant woman. Its being her kin may count as a serious reason against the permissibility of her destroying it.

Last, we have seen that it is still possible that a fetus may gain moral standing in virtue of its being a potential person. Because Tooley needlessly discarded two more attractive definitions of "potential person" in favor of a vague and somewhat obscure characterization, he was able to formulate four arguments that seemed to show that things like gestational processes, certain electrical or mechanical systems could be potential persons. He further reasoned that since it was not seriously wrong to destroy the systems or prevent the processes, it would not be wrong to destroy fetuses. My contention is still that his definition of "potential person" is a straw man and that his arguments do not defeat the conservative view.

All of this will not take away from the rigor and honesty of Tooley's work. Among liberal authors, he stands out as having driven very hard to refute conservative claims and to respond to objections

that have been raised against his own view over the years since its first publication. I have not in this space been able to do justice to the breadth of his work and only hope that I have captured the essential lines of his arguments.

Chapter 3: L.W. Sumner: A Moderate View

In contrast to the liberal and conservative positions, Sumner's "differential view" represents a moderate stance on fetal moral status. He claims that fetuses acquire moral standing gradually during gestation, that they have none to begin with and as much as a neonate just before their birth.¹ He argues from the principle that the capacity for sentience is the necessary condition for moral status and infers from this that the greater a being's capacity to suffer pain and enjoy pleasure, the greater its moral standing. Thus, early, non-sentient fetuses are not morally considerable at all; older fetuses with a minimal capacity for sentience have greater status and end-of-term fetuses, being as capable of pain and pleasure as neonates, have as great a moral standing as do the neonates. (Sumner;1981:126)

Sumner believes that this view avoids some of the inherent weaknesses of the liberal and conservative positions. For example, both liberals and conservatives must lay great moral weight on one event in a fetus' development: the moment of birth or the moment of conception. It seems to Sumner that this is not quite right. No one moment should bear such significance. Further, liberals and conservatives attribute a uniform moral status to all fetuses

¹Other authors who advocate a "graduated" view of moral standing, but not necessarily on the basis of increasing sentience are Daniel Callahan (1970), Joel Feinberg (1984), Edward Langerak (1979), Peter Singer (1979),.

granting either no moral status at all or full moral status. Such a stance, he observes, ignores the radical developmental differences between earlier and later fetuses. It also fails to attach appropriate significance to fetal development. Sumner's intuition is that the degree of moral standing a fetus has should reflect and parallel its physiological development. The view he proposes takes these factors into account and so, he would say, it is, on at least two counts, preferable to a liberal or conservative view; it neither requires that moral status descend suddenly, as it were, nor does it ignore the significance of fetal development and the great differences in a fetus at the various stages of its development.

It is not altogether clear to me that either of these factors adds much weight to Sumner's view though its moderateness is, in itself, an attractive feature. For one thing, there is no contradiction in saying that a morally significant event occurs "all of a sudden." Consider such events as the proclamation of war, taking an oath of office, rendering a courtroom verdict, pronouncing a marriage vow or even lowering one's imperial thumb. All carry tremendous moral weight and yet are sudden events. On the face of it, then, there seems to be no great difficulty in saying that an entity could acquire moral standing at a given moment in its life, as one acquires legal standing upon reaching the age of majority or social standing as in the feudal practice conferring peerage.

And, though the physiological differences between a near-microscopic zygote and an 8 lb. full-term fetus provide material enough for many a textbook, it does not follow that those

physiological differences are morally significant. Both liberals and conservatives, for instance, are more impressed with what they perceive to be morally significant similarities among fetuses at all stages of their development, viz. that they are all unborn or that they are all living human beings. It is not that liberals and conservatives deny the differences; it seems simply that they are more impressed by what they perceive to be significant similarities. In both cases, physiology is thought to be morally relevant but we have, as yet, no reason to think that the differences carry greater moral weight than the similarities.

It may nonetheless turn out to be the case that Sumner is right and moral status is acquired gradually and that the fetus' increasing capacity for sentience mirrors its increasing moral standing. This is the claim that Sumner must establish; the task is one of the major focal points of his discussion in Abortion and Moral Theory.

His defense of the thesis has four parts: he first argues that the liberal view of fetal moral status is untenable, then, that the conservative's fares no better. After this, he offers what he calls an "intuitive" defense of his differential view and finishes by showing how his opinion derives from classical utilitarian moral theory.

I continue then with a review of Sumner's work, always with an eye to developing a good principle about the necessary conditions for moral standing.

3.1 Failure of the Liberal View

Sumner criticizes liberals on abortion on a number of counts.² The part of his discussion that is of interest here is his contention that the liberal's claim that no fetus has moral status is untenable.

Sumner reasons that if liberals contend that all abortions are morally justifiable, it is because they assume that fetuses have no moral standing. He claims that the liberal's view on the morality of abortion stands or falls with her defense of this assumption. He writes:

The liberal view is utterly and unalterably dependent on denying moral status to the fetus; it cannot be supported on any other basis. (Sumner, 1981:72)

Not read in context, Sumner's assertion would be too strong for it is open to liberals to defend abortion as an act of self-defense or as a legitimate denial of support to an entity that is otherwise conceded to have a right to life. At this point in his discussion, he has already shown to his satisfaction that other liberal strategies for justifying all abortions fail. Thus, the only reason left to think that all abortions are permissible is that no fetus has moral status.

Be this as it may, Sumner needs to show why it is not true that no

² His criticism is fourfold. He contends that there is no existing theory of rights that can accommodate the liberal claim that all abortions are justifiable, that arguments intended to show that abortion is morally permissible even where fetuses are granted a right to life fail, that separating questions of public policy from questions of morality in the abortion dispute is unhelpful and, finally, that the liberal claim that all fetuses lack moral standing is untenable.

fetus has moral standing in order to establish the first support for his view on moral status. Whether he has adequately refuted liberal arguments for the morality of abortion based on reasons other than the fetus' lack of moral standing holds only marginal interest for us here. Our task is still to determine whether or not fetuses have moral standing at all, not to develop moral guidelines for abortion in general.

Thus, if Sumner is going to succeed in establishing his claim that moral status is acquired gradually during gestation, he will have to show why opposing opinions are false.

Liberals are wrong about the lack of fetal moral status, he contends, because both intuitive and, deeper, theoretical defenses of the claim are bound to fail. He says they are faced with a dilemma:

If they (liberals) wish to deny standing to (at least preivable) fetuses but not to infants, then in seems they must defend a threshold that is arbitrary and abrupt. If, on the other hand, they devise a deeper and more general criterion, then it threatens to deny standing to infants as well as to justify infanticide.

(Sumner, 1981:64)³

His strategy, then, is first to show that deriving the liberal

³Recall that establishing a moral principle about moral status "on an intuitive level" means attempting to establish it as a basic moral principle where a good basic moral principle is one that does not admit of counterexamples. Devising a deeper and more general criterion is treating a principle about moral status as a derived moral principle, the "deeper and more general criteria" being basic principles about rights or principles from moral theories themselves, from which the principle about moral status would be derived.

claim from established theories or moral principles entails endorsing the morality of infanticide. Second, he shows how an attempt to establish it on an intuitive level fails because all the possible basic principles about moral status that would support the liberal claim turn out to be arbitrary and shallow.

Sumner supports the first horn of the liberal's alleged dilemma by citing Michael Tooley's work as an example of a liberal argument that leads to the justification of infanticide. As noted above, Tooley's work is certainly the most articulate and complete defense of the liberal position in the current literature. His derivation of the liberal claim from his theory of rights-as-desires is exactly the kind of derivation from "deeper and more general criterion" that Sumner alludes to.

And, if one refers to the previous chapter, it will be clear that Sumner is right, for one of the main stumbling blocks for Tooley all along was that if his criterion for moral standing was to be maintained, infants would lack moral standing as would other incompetent human beings.⁴ So, it does seem true that the liberal has at least one horn of the dilemma to contend with: she must find some moral theory or theory of rights from which to derive the claim that human fetuses - and only human *fetuses* - lack moral standing.

There are two authors who offer arguments which, in fact, purport to do just this. I believe it is important to look at them

⁴The stumbling block is, more accurately, one for Tooley's readers and not for himself since he accepts the morality of infanticide..

before conceding Sumner's point. Christina Hoff Sommers and Ronald Green conclude, from separate arguments, that while fetuses lack moral standing, both infants and other human incompetents merit our full moral concern. (Sommers:1985 and Green:1974)

3.1.1 Christina Hoff Sommers: The Principle of Nurture

Sommers develops her view in the context of a review of Tooley's *Abortion and Infanticide*. She takes issue with his claim that there is no objective difference between previable fetuses and infants that would warrant our saying that the one is morally considerable and the other is not. Her argument has two parts. In the first, she establishes a moral principle to show that parents have an obligation to care for their infants. In the second, she provides an analysis of moral obligation from which we are to conclude that the obligation of parents to care for their infants cannot be extended to their fetuses. Thus, it will follow that while parents retain a duty to care for their infants, (making infanticide wrong) they have no such duty towards their fetuses, (making abortion permissible).

Parents have an obligation to care for their infants, Sommers claims, because human parents are moral agents. Anyone with a moral sense will recognize the obligation they have towards their young. As she puts it...

A "possible world" in which moral agents produce helpless and vulnerable children for whose nurture and protection they bear no moral responsibility would be morally unrecognizable. (Sommers;1985:41)

Parents who are moral agents, then, are bound by the Principle of

Nurture:

Moral agents are obligated to nurture and protect their infants. (Sommers;1985:41)

By itself, however, the Principle of Nurture does not rule out the possibility that moral agents also have a duty to care for their fetuses. Just as it is evident to Sommers that a world in which moral agents failed to have duties towards their infants would be a morally unrecognizable world, so would conservatives find a world in which they had no obligations towards their fetuses. Thus, Sommers needs to provide a basis for the rest of her claim; she must justify her denial that there is an objective difference between infants and previable fetuses such that fetuses could not be covered by a principle of nurture comparable to the one she has asserted for infants.

To do this, she appeals to a fact about moral responsibility, viz. that moral agents have duties only in cases where they are free to fulfill them. For example, though a moral agent might be bound by the Principle of Nurture to care for his infant, if it were not possible for him to do so, (e.g. because of ill health or disability) then he would be relieved of the responsibility. His infant, in such a case, would also have no right against him that he should care for it.

In the case of a human fetus, Sommers would say, neither the woman nor anyone else *can* nurture or protect it. The help a fetus receives is given involuntarily through the reflex physiological processes of the woman who bears it. It is not until birth that moral agents are able, voluntarily, to extend care and protection to their

offspring. Sommers puts it this way:

Birth is when the baby leaves the protection of the mother's reflex physiological activities and becomes wholly dependent on the voluntary action of moral agents. The primary responsibility to the infant thus has this natural starting point.
(Sommers,1985:41)

and...

What morally counts is the infant's capacity to survive in *total dependence on the voluntary acts of the responsible moral agents committed to its care.* (Sommers,1985:42)

This is why a principle of nurture that would extend to fetuses would still fail to guarantee them a right to protection. No moral agent, by Sommers' lights, can freely extend them such protection. Hence, previable fetuses have no rights against moral agents to receive it.

Here is the crucial difference that she sees between infants and previable fetuses. Infants have the capacity to be helped by those who are responsible for them. Preivable fetuses lack that capacity. The conclusion she desires follows from what has been said: infanticide turns out to be wrong while abortion is permissible.

It seems to me that there are some difficulties with Sommers' argument. For one thing, she is wrong about the impossibility of freely nurturing and protecting human fetuses. Preivable fetuses not infrequently become patients and may be helped by intrauterine

surgery or other medical intervention. Further, a woman may voluntarily nurture it by refraining from the use of alcohol, drugs and so forth during the pregnancy. And, certainly she may protect the fetus by not aborting it. Thus, it is hard to see why Sommers would think that fetuses cannot be freely nurtured and protected.

I believe she thinks this way because she construes nurturance and protection as requiring some kind-of direct interaction with the recipient. She writes:

In emphasizing the importance of "interactions" for the moral status of newborns, Zaitchik is quite properly attending to what Tooley is systematically ignoring. (Sommers,1985:42)

The passage that she chooses from Zaitchik to support her view also illustrates her understanding of interaction:

We know what it is to fondle it (prematurely born infant), to change its diapers, to get up in the middle of the night to see why it is crying, to invite relatives and friends to visit it, and so on Given these interactions between ourselves and the prematurely born baby, we see it as one of us, as a member of the human community, as a person. (Sommers,1985:42)

I understand her to mean that in order for something to count as voluntary nurturance or protection it must involve some sort of direct interaction with the recipient. Thus, presumably because no direct interaction with a fetus is possible, no voluntary help for it is possible.

As noted above, however, some interaction with previable fetuses is possible in the form of medical interventions. I don't know what Sommers would say about the obligation of moral agents to provide medical treatment for previable fetuses

Moreover, I fail to see why she wants to make direct interaction a necessary condition for an act to count as an extension of care or protection. It seems to me that there are many instances of both that do not involve direct interaction with the recipient. For instance, when one steps forth to shield another, there is no direct interaction with him (though there might well be a lot of direct interaction with the offense.) Passing laws is another way of protecting entities, human or otherwise, without directly interacting with them. As for nurturance, I would count Thanksgiving baskets and charitable donations as well as blood transfusions and organ donations as provisions of sustenance yet none of them need involve direct interaction with the recipient.

If I am correct in thinking that voluntary help and protection can be extended without direct interaction with the recipient then the actions that a pregnant woman performs when she deliberately eats nourishing food and exercises are instances of voluntary nurturance of her fetus. When she takes special care to wear a seat belt in the car or moves out of a smoke filled room, she is attempting to protect the fetus from possible injury. Further, one of the clearest examples to me of voluntarily protecting one's fetus is to refrain from aborting it.

Hence, if it is possible for moral agents to nurture and protect

their fetuses, then Sommers' argument has provided us with no reason to think that they ought not do so - at least, no reason that would not equally apply to infants. I think that Tooley's observation that there is no objective moral difference between previable fetuses and infants still stands good.

3.1.2 Ronald Green: Conferred Moral Status

Green is unique in the literature on moral status in seeing two ways to acquire moral standing. Until now, it has been assumed that an entity had moral standing in virtue of some property it possessed; Green sees the situation differently. He will move from principles about the nature of morality to the conclusion that some entities acquire moral standing, naturally or, in the traditional way, as it were, because of a property they have, and other entities acquire it in a different way, i.e. by decree. These latter have it conferred upon them by those who have it naturally. Moral standing thus derives from either of two sources, from a property that one possesses or from the consensus of the moral community.⁵

In the case of infants and fetuses, it will be seen that infants are

⁵Edmund Pincoffs has likened the situation to one of making membership decisions where "we" (those who possess moral standing naturally) must reach a consensus about whether to admit a class of beings (who lack moral standing) into the moral community, i.e. to accept them as one of us, conferring upon them the privileges of membership in the moral community. He will admit that the metaphor has some limitations but that it is useful for understanding the abortion choice, namely that it is a choice made by the moral community or some authorized part of it to extend or deny membership in the community to fetuses. (Pincoffs;1977: passim 43-48)

morally considerable and fetuses not so because the moral community decides to confer standing upon the one but not the other. To use Pincoffs' metaphor, we have decided to extend membership in the moral community to infants but not to fetuses.

To see why Green thinks the moral standing of both infants and fetuses is determined by community consensus, it is necessary to follow his derivation of the thesis from his theory about the foundation of morality.

He begins with what he calls a largely Rawlsian interpretation of the foundation of morality as a ... "non-coercive, rational means of settling social disputes." (Green, 1974: 60) Differences can be settled either by force and coercion, he notes, or by rational means, viz. by cooperating in the development and enforcement of principles of acceptable conduct. Clearly, the more civilized choice is to engage in moral discourse.

If this rings true thus far, it becomes evident that there is a class of beings who "naturally" engage in moral discourse and who ought to be included in all such discourse.

Thus, our understanding of the function of morality leads us to identify a class of agents who, by virtue of the very function of morality, must possess fundamentally equal rights: **all those agents with whom we can possibly come into dispute, who display an elementary rational ability (that is, the ability to take effective means to ends) and who are capable of understanding and respecting moral rules.** (Green, 1974: 58)

Basic rights - or - "natural" moral status, here, are thought to be generated from a being's capacity to cause social conflict and to

engage in the rational adjudication of such conflict. As Green puts it:

Without seeking to convey the full depth of this issue, I can put the matter bluntly by saying that any being with the capacity to pull the trigger of a gun, and to refrain from doing so out of obedience to moral rules, deserves our moral respect.
(Green, 1974: 61)

Clearly, on this account, fetuses, infants and other human incompetents do not, naturally, at any rate, deserve moral respect because most of them are incapable of causing social conflict and all of them lack the capacity to understand or be persuaded by moral discourse.

Nonetheless, Green concedes that many entities lacking this capacity appear to have moral rights. Pets, domestic animals, the severely retarded or senile, infants and young children fall into this category. Given his account of the origin of rights, he needs to give a reason for our apparent duties toward some incompetents.

Green's solution is that incompetents are third parties whose tolerance may or may not contribute to the production of a secure, stable social condition in which rational agents may pursue their interests. And, since the goal of morality was just to insure such a condition, part of the community's moral discourse will be the evaluation of the effect of maintaining or destroying a class of incompetents. Where the destruction of members of a class of incompetents would affect the rational agents in a negative way, the community ought to confer rights upon those class members. But, if

maintaining a certain class of incompetents proved socially harmful then the community would decide not to confer rights on its members.

Thus, it would come to be that though an entity lacked the capacity to engage in moral discourse, it could share in the benefits of membership in the moral community. Its status would have been conferred upon it in virtue of its value to rational moral agents.

In considering the way in which beings who are not rational or who lack moral capacity are to be treated, rational agents must ask how particular forms of behavior with respect to these beings affect themselves. Should they decide that certain actions jeopardize their own security and inflict unacceptable evils, they can formulate, and enforce, rules to prohibit that behavior. Their decision in this regard amounts to conferring rights on these beings....Conferred rights are not necessarily weaker or stronger than basic rights since their force and their enforcement depends upon the decision of rational agents. (Green, 1974: 61-62)

Basic rights, as he calls them, are possessed by rational moral agents - naturally - in virtue of their capacity to engage in social conflict and participate in the rational adjudication of it. Since neither infants nor fetuses can do this, neither has basic rights or natural moral standing. If infants have moral status, which they certainly seem to, it is because rational moral agents have weighed the consequences of not protecting them and seen that this course would threaten their own security and inflict unacceptable evils upon them.

However, the situation is different with fetuses. Granting rights

to the class of fetuses would impose considerable hardship and sometimes serious danger to many rational moral agents. Thus, the decision is made not to confer rights or, alternately, moral standing, upon the class of fetuses.

This view does not preclude the possibility that someone may choose to confer moral standing on an individual basis. Though the community will not give blanket protection to all fetuses, it may protect the fetuses of women who elect to have them protected. The view accomodates the "pro-choice" claim about the appropriateness of letting each woman, qua moral agent, decide for herself whether to extend her own and the community's resources for the support of a fetus. Because the woman is in the best position to know whether or not the continued existence of a particular fetus will threaten her own well-being it is she, as a moral agent, who must assess the consequences of carrying a pregnancy to term. If doing so jeopardizes her own or other moral agents' security, if it inflicts unacceptable evils, then she must not confer moral standing upon the fetus. But, if she sees that continuing the pregnancy will, at least, produce no harm, then, she may elect to confer status upon the fetus and bring to bear her own and the community's resources for its well-being.

Green's account is thought-provoking. One cannot fail to applaud the primacy given to moral agency, as we have been taught to do since at least Kant's time. Further, it appears to capture the heart of the liberal's overarching belief that decisions about the treatment of fetuses ought to be made by the moral agents who will be

affected by it. Only in the case where failing to extend protection to them would cause turmoil and harm to the community at large is it thought that laws and policies should be established to ensure their protection. Otherwise, the decision should be left to the rational agents immediately concerned.

Applying Green's theory across the board, we would be led to conclude that in our society, harsh treatment of the insane, the senile, and infants must be thought to threaten our own security, to insult our sensibilities, for we have conferred moral standing upon them. The abortion of fetuses must pose no comparable threat since the decision is left to the individuals concerned.⁶

In spite of its explanatory value, there are reasons why Green's view does not settle the issue of moral status. First off, it is bound to a specific understanding of the foundation of morality as a process for adjudicating social disputes. Many will disagree with it only for this reason. For instance, anyone who thinks morality is for maximizing happiness or for promoting virtue will reject his interpretation. Second, the theory of rights he proposes does not clearly follow from his view about the nature of morality. He has said that there is a class of agents who bear fundamentally basic equal rights in virtue of their capacity for rationality and their ability to respect moral laws. In other words, one has natural moral

⁶On Green's view, it would seem that the moral community is now in the process of weighing the status of the irreversibly comatose as the courts debate whether they are to be protected by law or whether the decision will be left to those who are most directly affected by their continued support.

standing if and only if one has the capacity for moral agency. It seems, however, that entailment here is too strong a relation. If the foundation of morality is the resolution of social conflict, then it is true that only moral agents can participate in that resolution. But what follows from this is that only moral agents have *duties* to abide by moral rules, for they are the only ones who are capable of governing their behavior according to them.

The link between the capacity to be persuaded by moral reasoning and the obligation to settle (or avoid) social disputes by using moral principles is clear enough, but I do not see the further implication that only moral agency entails moral privilege. If anything, it seems more likely that the capacity to enjoy the fruits of social concord should imply moral privilege. There is some plausibility to the claim that where an entity can benefit from social harmony and community support, its welfare ought to be weighed in the moral deliberation of those whose duty it is to establish and maintain a working moral community.

Green might object to my reasoning here on the grounds that rights are, necessarily, the correlates of obligations. This would support the conclusion he wants, viz. that only moral agents have basic rights (or, alternately, that only moral agents have natural moral status.) But he has not argued this way. All that he has said is that it follows from the nature of morality that only moral agents have natural moral standing. And, as noted above, it is not unreasonable to maintain that from his theory of the purpose of morality, it could follow as well that any entity that can enjoy the

fruits of social harmony has a prima facie right to do so --- not only those entities that can be persuaded not to cause social conflict.

Also, Green's reasoning does not escape Sumner's criticism, for on his theory infants turn out to have as near tenuous a moral standing as do fetuses. If their rights exist only where it is perceived that their conferral causes no great discord or overwhelming difficulty for the community, then should circumstances change for the worse, infants' "rights" would dissolve. Though Green is persuaded that "conferred" rights would be no weaker or stronger than "basic" rights, I cannot see the basis for his confidence. Given differences of perception and opinion that moral agents are bound to have on the matter of how much turmoil the continued protection of a class of incompetents will be allowed to cause before it is "too much", the "conferred rights" of infants and other incompetents seem shaky indeed.⁷ They are more like conditionally tendered benefits than "rights" at all.

In the end, then, Green has offered an intriguing view about the source of moral status, or rights, but one which breaks too hastily and, I believe, unnecessarily, with the traditional understanding of moral standing as being predicated on the possession of some natural property. The consequences of deriving the rights of the entire population of human incompetents from the consensus of

⁷From the point of view of prudence, I wonder if Green's theory would not prove a temptation to overrate the "threats" to our security posed by the demands of providing for incompetents. At the least, it would make it harder to see the boundaries between moral hardness and genuine heroism.

those who are considered morally competent are so grave that only the clearest and strongest of arguments ought persuade us on this account. And, Green's argument has not that strength.

Returning to the mainstream of the discussion where Sumner has posed a dilemma for liberals, we conclude that one horn of it still stands strong. The theories that would support a denial of fetal status also support infanticide.

The second side of the dilemma Sumner poses is that liberal attempts to establish their claim by appeal to moral intuitions requires their defense of "a threshold that is arbitrary and abrupt."

As we have seen above, the charge that the acquisition of moral status is abrupt, or sudden, is not a serious one, for many morally significant events occur suddenly. However, if the proffered threshold of moral standing is arbitrary, then there is good reason to reject it.

Sumner contends that if liberals think all infants have moral standing and all fetuses lack it, then the threshold of moral standing must be birth itself. There must be something about the neonate that birth has occasioned, something that the fetus lacks and that something must be the necessary condition for having moral status. Thus far he seems to be on the right track.

His next move is to examine the changes for the fetus that come about as a result of its birth to see if any one of them is morally significant. He lists four possibilities:

- A. the fetus ceases to inhabit another person's body;
- B. the fetus becomes more accessible to others of its kind;

- C. the fetus begins to handle its own respiration, digestion and excretion;
 - D. the fetus' direct link to another person's body is severed.
- (Sumner, 1981: 52)

In the first case, a fetus, in being born, changes its location. Sumner does not think that location is an important factor in the determination of moral standing. He cites the case of the scientists in Fantastic Voyage as examples of entities who were inside a human body but did not forfeit their moral standing because of it. In this he seems correct, where an entity is ought not affect its importance, though its location may well have significant bearing on the kind and amount of help we may extend to it should there be a need. Thus, we might say that the voyagers' actual positive right to life is weakened by their location.⁸

In the second case, the fetus, in being born, becomes more accessible to other human beings. Again, Sumner finds this an unlikely source for moral standing. He argues that astronauts in quarantine become no less worthy because of their isolation, which is true. Neither do hermits in the desert or inhabitants of remote villages count less for their inaccessibility. But, as we observed above, their actual positive rights may turn out to be weaker than those of people we can reach to extend help that is needed. The solitary monk meditating high on some Himalayan crag, of course, has a prima facie right to life, both in the positive and negative

⁸I am appealing to the distinction between a negative right to life which entitles the bearer not to be killed and a positive right to life which would guarantee him that which he needs to maintain his life..

sense, but the strength of his actual positive right is limited by his inaccessibility.

Be that as it may, it will not apply to fetuses, for as the discussion of Sommers' view above has shown, fetuses are accessible to us. Were they not, there would be no need to discuss the ethics of abortion.⁹

Upon birth, the fetus also changes in that it now begins to handle its own respiration, digestion and excretion. These capacities are obviously poor choices for indicators of moral status. As Sumner notes, many entities that have a clear cut right to life do not "handle" their own bodily functions. They use respirators or dialysis machines to do it for them. Thus, from the point of view of morals, a human being who cannot breathe or process waste or food does not count less than one who can. If anything, we treat them more kindly because of their disability.

Finally, Sumner considers the possibility that infants possess the moral standing lacked by fetuses because infants are no longer directly linked to their mother's body. If this were the case, moral status would be predicated upon not requiring another's body for life support, or, as Sumner puts it, upon not being parasitical upon another's body. The point liberals would be making here, he suggests,

⁹Daniel Callahan has pointed out that the fetus' accessibility has generated a particularly troublesome difficulty for the "pro choice" position on the permissibility of abortion. It is now at the same time legally permissible to destroy a healthy 22-24 week old fetus where imperilled fetuses of the same age may be the objects of heroic life-saving attempts. This disparity of treatment, he says, "calls attention to the apparently arbitrary and contingent value of the fetus: an abortable 'product of conception' from one value perspective, and a cherished 'baby' and 'patient' from another - but the same organism in either case." (Callahan, 1986:34)

is that it may be permissible for hosts to act on parasites in ways in which it would be impermissible for them to act on other creatures.¹⁰

But Sumner rejects the notion that being parasitical on another should affect one's rights. The parasitical relation could be morally significant, he concedes, but not in such a way that it would grant or deny rights. For instance, he writes:

... morally significant relations among right-bearers do not affect the sets of rights they possess... but only what those rights require or permit *in those circumstances*. (Sumner, 1981:53)

He argues that such relations do not affect rights because if they did, then the rights in question would turn out not to be natural rights. A natural right, he claims, is a right possessed independently of the bearer's relation to others. (Sumner, 1981: 53)

I believe he is not altogether correct in saying that natural rights are not contingent on the bearer's relation to another. For instance, it seems that a child's right to be provided for by its parents is a natural right (as opposed to a conventional one) and it derives from

¹⁰This is precisely the position defended by Marjorie Reilly Maguire in a paper read for the panel on "Personhood and Value in the Reproductive Rights Debate" at the December, 1986 conference, Ethical Issues in Reproductive Health: Religious Perspectives, sponsored by Catholics for Free Choice. She distinguished between helpful and harmful parasitism and concluded that a fetus' moral status or "personhood" was determined by the woman's perception of the parasitical relation as a helpful one.

the child's special relation to certain adults. But the natural rights to life, liberty, education, and so forth, do seem to be held independently of the bearer's relation to anyone else.

His claim here is no doubt too strong; not all natural rights are held independently of the bearer's relation to others, but perhaps the right to life, which is the one in question, *is* held independently.

What he should say is that morally significant relations among right-bearers do not affect the right to life they possess, but only what the right to life requires or permits in certain circumstances.

I doubt that such a conclusion would be seriously challenged. It would be easy for Sumner to support it with the example of Siamese twins where the one's life depends on its continued use of a vital organ in the other's body. The dependent twin seems no less a moral object than its "host." Both are believed to have a right to life though it will not be possible to honor the parasitical twin's right for very long. Hence I believe that Sumner is ultimately right in saying that an entity's parasitical relation to a human being does not affect its moral standing *per se* but only what one may do to it in these circumstances. But he has not made a clear case for this in the text.

Overall, however, it seems that Sumner's criticism of the liberal view that birth constitutes a moral watershed is effective. There appears to be no property that a fetus acquires during the birth process that would mark its acquisition of moral standing.

Sumner is also right in saying that attempts to ground the liberal view in a deeper, more general theory lead to the acceptability of

infanticide. Tooley's arguments do this as does Sommers' appeal to a "Principle of Nurture" and Greene's attempt to defend the very risky view that the rights of human incompetents are derived from the consensus of moral agents. It was seen that Sommers' "Principle of Nurture" could apply to fetuses as well as to infants and that the moral guidelines Greene offers for conferring rights can be used to deny them to infants as well as to fetuses.

The liberal is indeed caught in a dilemma. If she denies that any fetuses have moral standing, her claim is based either on a shallow and ad hoc criterion for moral standing or she draws it from a more general moral theory that ends up denying moral status to infants as well.

3.2 Failure of the Conservative View

Sumner's criticism of the conservative claim that all fetuses have moral standing runs parallel to his criticism of the contrary, liberal claim that none of them has moral standing. Conservatives are caught in their own dilemma, he contends. If they appeal to moral intuitions to support their claim, they, like the liberal, will end up defending a shallow criterion of moral standing but if they attempt to derive their conclusion from a more general moral theory, they will have to accept the unhappy and unlikely consequent that gametes, as well as fetuses, have moral status. He sums it up this way:

Preserving the significance of conception requires resort to a shallow criterion of moral standing (membership in the human species). A deeper criterion, if it awards moral standing to fetuses, will award it also to gametes, the conservative's attack on abortion thus also condemns contraception.

(Sumner, 1981: 105)¹¹

If, as conservatives say, fetuses acquire moral standing at conception, then there is some property they acquire at that time that is a necessary condition for "counting", for being a moral object. Sumner suggests that the only morally significant property they acquire at conception is that of becoming a member of the human species. He can see no other trait in the miniscule "product of conception" that would warrant its being morally considerable.

But, if membership in the human species is what it takes to "count", then the criterion is indeed shallow, for there is no self-evident reason to think that the human species, merely in virtue of its being human, merits greater respect than any other. To claim as much is to exercise our own brand of chauvinism, a "species chauvinism."

Sumner, though, considers the possibility that the conservative's criterion for moral standing is not membership in the species simpliciter but membership in a class whose typical members

¹¹Sumner's reflections on the conservative's claims about the moral status of fetuses are part of his criticism of the conservative position on the morality of abortion. He thinks conservatives are wrong about the ethics of abortion not only because their claim that all fetuses are morally considerable is untenable but because the arguments they offer based on a principle of self-defense and the natural law principle of double-effect also fail.

display a morally significant property and which, coincidentally, is also the class of human beings. Thus, although the scope of the class of human beings is the same as that of the class whose typical members possess a morally significant property, it is membership in the latter set that guarantees moral standing. Sumner explains it this way:

If being human fails as a criterion, this does not imply that it is irrelevant to the distribution of moral standing. It is simply not intrinsically relevant, as a criterion must be. But it could still turn out as a matter of fact that all and only human beings have moral standing, because all and only human beings have some further property that is a plausible criterion of moral standing. If this does turn out to be the case, then species membership can function as an indicator of moral standing (we will be able to pick out the class of creatures with a right to life by attending to their species), though not as a criterion. (Sumner, 1981: 93)

There are a number of properties that present themselves as likely criteria for moral standing and whose possession is restricted to typical members of the human species. A high level of intelligence (compared to that typical of other species), rationality, moral agency and the capacity for a rich life are some of them.

If it were the case that, for instance, rationality would be the criterion of moral standing, then, because typical members of the human species are rational, all other, non-rational, members of the species would also merit respect. As Sumner puts it, they would..."ride the moral coattails of the paradigm rational being." The determination of moral standing turns out to be a two tiered process: first one identifies a natural kind whose typical members

possess the morally significant property, perhaps rationality, and then one makes the inference that the kind, or class, is morally significant.

On the face of it, then, the conservative's claim would be plausible. All fetuses would have moral standing because they were members of the class whose typical members possessed the morally significant property of rationality.

One problem Sumner sees with this is that it contradicts a further claim made by conservatives, i.e. that all and *only* human beings have moral standing. He sees no reason to use the criterion of rationality for determining which class has moral standing but not to use it to determine which individuals have moral standing. It is odd to think that rationality (or some other morally significant property) should be important in a class of beings but not in an individual being. Yet if conservatives rule out moral standing for intelligent non-human animals, machines or, perhaps, extraterrestrials, whose typical class members happen not to be very bright this is precisely what they must do. They must say that the class of beings "counts" because it, i.e. its paradigmatic members, are rational but an individual entity that is rational does not "count" (unless, perchance, it is one of the paradigmatic members of a rational class.) Sumner observes that all of this seems to be but a thinly veiled assertion of species chauvinism. For if rationality, or whatever property is morally significant, is what makes an entity important, then it ought to do so regardless of whether its bearer is a class or an individual. Anything that has the morally significant

property ought to have moral standing just in virtue of having it.¹²

Thus, if conservatives were to maintain that all and only human beings have moral standing, they would be basing their claim on the legitimacy of species chauvinism. As such, their position would be unimpressive.

Further, even if conservatives allow that "qualified" non-humans can have moral status, they will be guilty of chauvinism if they say that human fetuses and "unqualified" human beings also have moral standing. Just being part of species does not seem to be enough to warrant the special status of the paradigmatic members. What presents itself as more important is having whatever property is necessary for moral status - or, at least, having the potential for it.¹³

However, without the assumption of species chauvinism, there appears to be no reason to say that those who will never be rational or morally competent have moral standing. We may wish not to harm or destroy them for other reasons, but not because they have moral standing.

Sumner's contention, then, that conservatives flirt dangerously with species chauvinism is not without merit. Those who claim that all and only human beings have moral standing are hard put to

¹²That anyone should say that each member of a class has moral standing because the class itself has it can also be construed as a simple fallacy of division.

¹³It makes more sense to say that if we value rationality or moral agency, that every entity that is rational or morally competent merits our respect and that those who will come to be rational or morally competent might also have some claim to it than to create a "golden parachute" for humans who otherwise do not satisfy the criteria for moral standing.

explain away their bias in favor of the human species. If they allow that non-humans that meet the necessary criteria for moral standing have it, they will still have the problem of explaining why it is that humans who fail to meet the criteria and lack even the potential for meeting them, nonetheless have moral status - all this without an appeal to the inherent worth of our species. If conservatives refuse to consider the possibility of rights for non-humans or cannot explain why some humans who do not meet the criteria for moral standing have it still, then, assuredly, they are caught on the first horn of Sumner's dilemma. ¹⁴

We must wait until the discussion of the merits of the conservative view in Chapter 4 to see whether or not conservatives can justify their position on fetal standing only if they assume that the human species merits moral privilege just because it is "the human species."

However, perhaps more headway can be made in assessing

¹⁴It is possible that conservatives base their argument on a species chauvinism but one they feel is justified by religious belief. For instance, in the religious traditions of Judaism and Christianity, humanity is exalted as the crowning piece of creation, as God's chosen people made in his image and likeness. The species as a whole is said to be preserved and saved by his divine intervention. That God should choose to create and interact with such a species would be a convincing reason to believe that each of its members and no others merits moral standing. Add to this the scriptural injunctions to love even the "least of the brethren" and so forth, there is considerable weight behind the belief that each member of the species "counts."

It is Peter Singer's opinion that such religious beliefs have become so ingrained in Western thought that their enactment has become the very measure of a nation's civilization. Yet, he contends, since they are religious beliefs, they will not serve as a good basis for rational discourse. That all humans have moral standing must be established on other, non-religious grounds. (Singer, 1979: 125)

Sumner's second line of criticism. Here he contends that if conservatives attempt to give their thesis a theoretical backing, they will end up either with a distorted understanding of rights or, by condemning contraception with the same force as they do murder, neither of which is a tolerable alternative.

His reasoning is that the conservative view, if it has a theoretical basis, has it in natural law theory, and, specifically, from a natural law understanding of potentiality. Sumner has it that conservatives attribute a right to life to fetuses on the basis of their potential for future rights.

But, he thinks that such potential cannot be the basis for moral standing. One reason is that assigning rights on the basis of potential properties rather than actual ones is an unusual and counterintuitive way of assigning rights. A second reason is that if potential for moral standing is enough for having a right to life, then gametes have a right to life and contraception becomes seriously wrong, which is unlikely. These two charges together constitute the second horn of Sumner's dilemma for the conservative.

In the first case, Sumner says that assigning rights on the basis of potential deviates from the customary way of assigning rights.

Rights are normally owned by (and duties owed to) creatures in virtue of the properties or abilities those creatures actually possess, not in virtue of those they will come to possess in the future. Thus the right to vote is owned by those who have actually achieved a stipulated age and not by those who will reach that age in the normal course of development.
(Sumner, 1981: 102-3)

Sumner further claims that the feature of datedness is not peculiar to conventional rights but holds for natural liberty rights as well. (Sumner, 1981: 103)

In response to Sumner's observation, it seems that datedness does not necessarily preclude the possibility that fetuses would have a right to life. Though it may appear paradoxical, it can be said that some rights are predicated on the possession of an actual property, but the actual property is potentiality. For example, we assume that children have a right to be educated. And the right, I would think, is derived from their potential to learn. In much the same way, we think that people who are ill have a right to medical care; I presume that the right is derived from their potential to benefit from it. Thus, it is not so unintuitive to say that a fetus may have a right to life because it has the potential to continue living or because it will benefit from it.

Tooley's problems with the rights of little boys and infant girls are also cases in point. That the infant girls have a right not to be conditioned into future dullness and the little boys not to be made into eunuchs for the sake of the choir can be interpreted to mean that their actual rights are predicated on their potential for, in the first case, living stimulating and challenging lives or, in the second, their potential for sexual activity. Thus, again, it would appear that some actual rights are derived from the, actual, possession of the property of potentiality.

As in the case of the right to education and the right to medical

treatment, it is the possession of a certain potentiality, that guarantees the rights of Tooley's infant girls and little boys.

I would suggest that a fetus' right to life can be construed as a right based on potential. If a fetus lived, it would come to have many capacities from which it would derive its rights. To destroy it now would be to prevent it from achieving what it would were it allowed to live.

Another way of putting this is to say that entities have a right, now, not to be deprived of what they will need to exercise future rights. Fetuses, minimally, need to stay alive in order to exercise their future rights. Thus, they have a right, now, not to be killed, as children have a right not to be conditioned or castrated or deprived of education or medical attention - and, all of these rights amount to rights based on potentiality.

Sumner's appeal to the datedness of rights, then, does not constitute a real stumbling block for the conservative. Thus, the weight of the argument for the second horn of the dilemma falls entirely on his claim that defending the moral status of fetuses means defending that of gametes.

Sumner derives this conclusion from his understanding of human potentiality and the biological data of human reproduction. The potentiality argument for fetal status, he says,

... assigns moral standing to that which in the normal course of development will come to display rationality.

(Sumner, 1981: 103)

He is careful to specify that "in the normal course of development" is to be understood as teleological normalcy and not statistical normalcy. This is the more accurate interpretation of the conservative, i.e. Aristotelian-Thomistic, natural law notion of potentiality. He writes:

... it is also normal for ova to be fertilized (though it is unlikely that any given ovum will be fertilized) and for spermatozoa to fertilize (though it is overwhelmingly unlikely that any particular spermatozoon will do so). Since both are gametes (sex cells) fertilization is what they are *for*. But then if protection of life is to be extended back to fetuses, embryos or zygotes in virtue of their potential, it must by parity of reasoning be extended back to ova and spermatozoa in virtue of theirs.
(Sumner, 1981: 104)

If Sumner is correct, conservatives believe:

- a. that whatever will come to display rationality has moral status at every stage of its development, and
- b. that gametes normally develop into rational adult human beings.

But conservatives probably do not believe a. I know of no statement in the current literature which ascribes to conservatives the view that a half-built artificial intelligence machine, for example, has moral status. And, usually, conservatives claim that the insane, retarded children and other irreversibly incompetent humans also have moral standing. So, it is unlikely that they would agree to a.

Neither would they assent to b. for if my understanding of the

biology is correct, gametes cease to exist upon fertilization and a new entity comes into being. A sperm or an ovum does not itself develop into a mature human being any more than chlorine, alone, develops into salt. Thus, just as it would be wrong to say that chlorine has the potential to taste salty it is wrong to say that an ovum has the potential to reason.

Dennis J. Horan has made the same observation this way:

The natural end of the individual sperm and ovum is death unless fertilization occurs. In other words, we are neither grown-up sperms nor are we grown-up eggs. At fertilization a new and unique individual is created which, although receiving one-half of its chromosomes from each parent, is really unlike either.
(Horan, 1977: 564)

The conservative sees potentiality (for any trait or capacity) as a property possessed by an individual entity, possessed in such a way that the entity, *itself*, will come to display in the normal course of its development.¹⁵ For the conservative, the biological fact that gametes, qua gametes, do not possess the potential to develop whatever property guarantees moral status (for they cease to exist upon conception) is enough for them to say that gametes are not potential bearers of moral standing.

But, evidently, this is not the way Sumner understands the concept of potentiality. He does not explain his objection further

¹⁵cf. discussion of May, Ch. 4 below. See also Francis Wade, "Potentiality in the Abortion Discussion", Review of Metaphysics, vol.29, December, 1975: 239-255, for a very good exposition of the conservative understanding of the concept of potentiality.

and, given that the biological data is not at all esoteric, one has to wonder what would motivate him to think the way he does. My only suggestion is that Sumner may be assuming a process centered ontology rather than a metaphysics of continuants. If this were the case, then a human being would be a process whose beginning would be difficult to pinpoint but part of which would certainly be the life of a particular ovum and sperm. Thus, if a fetus had moral standing because it had the potential to develop into an adult human, every other part of the process that ended in an adult human ought also have moral standing. Hence the case for the inviolability of gametes.

All of this is tentative of course; Sumner has nowhere said that he espouses a metaphysics of process. But it seems to me that it would provide him with support for his claim that a fetus' potentiality falls into the same category as that of gametes.

The dilemma Sumner posed for conservatives has some force. On the one hand, conservatives, even if they accede to the possibility of rights for non-humans still have to explain why they think that humans who lack even the potential for meeting the standard of moral status --- be it rationality, moral agency or the capacity for a rich life --- nonetheless have moral standing, without assuming the truth of species chauvinism. One way they might be able to do this is by defending a criterion of moral standing so low that even a profoundly retarded human or a deeply psychotic human could meet it. The danger here, of course, is that many non-human animals will also be able to meet the criterion and the scope of animal rights will be correspondingly enlarged. I think there is a point where even

the most enthusiastic supporter of animal rights will want to say that an autistic human counts for more than a very bright dolphin. But, the conservative has yet to explain why this is so.

However, a conservative appeal to natural law theory would justify the view that a fetus' potential to become an adult human being warrants its having moral status. We saw above that such an appeal would not entail a distorted method of assigning rights, as Sumner had contended, but that it did assume an ontology of continuants. That is to say, gametes, as individual kinds of things, do not develop into adult human beings; they die at the time of conception. Thus, they do not have the potential that individual fetuses do. But, this makes sense only if individual things or continuants are the basic ontological "reality". If someone were to hold an alternative metaphysical theory, viz. one where processes were basic, then it would be reasonable to say that gametes did have the same potential as fetuses for they are as much a part of the process that ends in an adult human being as are fetuses.

The difficulty for conservatives is at the level of deep structure. In order to defend the unique potential of fetuses, they must first defend an ontology of continuants.

Given the scope of this research, it is not feasible to argue the merits of one ontology over another. Thus, since Sumner has not stated his preference of a process centered metaphysics, I will not assume it in his behalf and will, rather, conclude that he is wrong in saying that gametes have potential to develop into adult human

beings.

It turns out at this point that Sumner has provided serious challenges to both the conservative and the liberal. He has argued forcefully against the criteria of birth and conception as moral watersheds and has shown the difficulty of attempting to maintain the liberal's stance on the morality of abortion with the immorality of infanticide and the conservative's view about the immorality of abortion with the morality of contraception.

Sumner then may go into the next part of his defense of the "differential" view with some confidence. If he can show that his view is less problematic than the liberal's or conservative's, we would be compelled to accept it as the best current theory.

3.3 Intuitive Defense of the Differential View

The differential view is moderate, assigning moral status to some fetuses but not to others, thereby justifying some abortions but not all. Sumner claims that fetuses acquire moral standing gradually during gestation. He believes that sentience is the property that indicates moral status; that as fetuses become sentient and then increasingly so, they cross a threshold into moral significance and acquire progressively greater moral standing until such a time as they join the ranks of paradigmatic bearers of moral standing, i.e. of "adult human being(s) with normal capacities of intellect, emotion, perception, sensation, decision, action, and the like." (Sumner, 1981: 128)

The view is differential in that it provides a criterion for distinguishing among those fetuses that are morally considerable and those that are not. For instance, fetuses that are not yet sentient will have no right to life; older fetuses that give evidence of some degree of sentience will have a weak claim to life and mature fetuses that are as sentient as neonates will have as strong a claim as do neonates. The view also accomodates the intuition that from the point of view of morals, early abortions are not as serious as later ones.

Sumner does not assume that sentience is the obvious criterion for moral standing. He discusses three others at some length before settling on the sentience criterion. Intrinsic value, life itself and rationality seem, initially, also to be plausible criteria.

He contends that intrinsic value as a normative property, does not lend itself readily to the task because a criterion of moral standing "must connect moral standing with some property of things whose presence or absence can be confirmed by a settled, objective, and public method of verification" (Sumner, 1981:130-1). But the confirmation of the presence of a normative property like goodness or value (intrinsic or instrumental) is always done indirectly by confirming the presence of another property in virtue of which something is good or valuable. Thus, a property like intrinsic value is not well suited to provide a norm for moral standing, for it is, itself, a norm for something else. His point is well taken:

... if things have moral standing in virtue of having intrinsic value, and if they have intrinsic value in virtue of some natural property, then it is that natural

property which is serving as the real criterion of moral standing and the middle term is eliminable without loss. A theory of intrinsic value may thus entail a criterion of moral standing but intrinsic value cannot itself serve as that criterion. (Sumner,1981:131)

But if intrinsic value is not a good measure of moral standing, perhaps life itself is. Perhaps it is sufficient that something merely be alive for it to have moral standing. This is the view defended by Kenneth Goodpaster (Goodpaster, 1978).

Sumner rejects Goodpaster's conclusion for three reasons. First, he thinks that the notion of mere life being the criterion for moral standing is counterintuitive; second, he objects because a standard like "being alive" would provide no comparison criteria, i.e. no guidelines for preferring the interests of one entity over those of another, and, third, he believes that Goodpaster's view is internally inconsistent (Sumner,1981:passim;132-7).

The substance of Sumner's first objection is that adhering to the life criterion would mean according moral weight to the lives of plants and simple animals. He asks rhetorically, "How could we conduct our affairs if we were to grant protection of life to every plant and animal species?" Such a stance would be at the least counterintuitive.

Goodpaster, however, recognizes the potential trouble and is careful to distinguish between moral obligations that are *regulative for an agent*, that is, that are "defensible on all grounds independent of operativity" and those that are *operative for an*

agent, i.e. where the "thorough acknowledgment of X' (moral status) is psychologically (and in general, causally) possible" for the agent (Goodpaster, 1978: 313). The distinction is meant to be akin to Ross' categories of *prima facie* vs. actual duties (Goodpaster, 1978: 313). By appealing to the distinction, Goodpaster is able to acknowledge that it probably will not be humanly possible to protect the life of every living thing. But this will not be to say that some living things have no moral standing. Hence, we will be able to conduct our affairs as before; the difference being that we would have some obligation not to destroy living things wantonly.¹⁶

Still, if we are to respect all living things, how are we to decide competing claims when it is not possible to respect them all? How is a moral agent to determine which obligations are only regulative and which are both regulative and operative for them. Since, as Sumner observes, all beings that are alive seem to be equally alive, we would be at a loss to decide which of our obligations to expend our resources on. We should have no reason, say, to prefer the life of the tribesman over that of the tiger that was attacking him. Goodpaster's theory, then, does appear to fall short for lacking "comparison criteria"

In his behalf, however, we should say that he recognizes the desirability of comparison criteria. At the close of his paper, he writes,

As indicated earlier, numerous other questions are waiting in the wings. Central among them are

¹⁶ Goodpaster's intuitions are strongly reminiscent of those expressed by Albert Schweitzer in Reverence for Life (Schweitzer, 1969) or, perhaps, it is vice versa.

questions dealing with how to balance competing claims to consideration in a world in which competing claims seem pervasive. (Goodpaster, 1978: 325)

Further, there seems to be no inherent difficulty in separating the task of determining an inclusion criterion from that of developing comparison criteria. Sumner's plan of providing a criterion that is at once inclusionary and discretionary would yield a more elegant theory but this is not to say that a two-part theory such as Goodpaster has in mind could not be a good one.

So far, then, Goodpaster's proposal, that being alive is necessary and sufficient for having moral standing, does not do too badly. However, I believe that Sumner's third point of criticism will carry through and that Goodpaster's "life" criterion turns out to be internally inconsistent - but not exactly for the reason Sumner gives.

In order to understand Sumner's criticism it will be necessary to backtrack a bit to Goodpaster's justification of the "life" criterion. He observed that all living things were teleological systems, that is to say, that they have "functions, ends, directions, natural tendencies, and so forth". (Sumner, 1981: 132) In virtue of their teleology, living things then have needs or conditions which must be satisfied if they are to achieve their purposes. As such, they can be harmed or benefited. They are harmed when they are prevented from achieving their purpose (from living and thriving); they are benefited when they are helped or at least not hindered from achieving their

telos. And, as Sumner puts it...

...it is common to construe morality as having essentially to do with benefits and harms or with the good of creatures. So doing will lead us to extend moral standing to all creatures capable of being benefited and harmed, that is, all creatures with a good.
(Sumner, 1981: 132-3)

Life, then, would turn out to be the only reasonable criterion for moral standing. Yet, Sumner observes, not only living things are teleological systems. A lawnmower, for instance, has as a purpose the trimming of lawns and it can be benefited or harmed by, on the one hand, being tuned up, having its blades sharpened etc. and on the other, by being left out in the rain or being run over rocky and pitted terrains. Thus, Sumner contends, Goodpaster ought not restrict the possession of rights to living things; if having a *telos* means having interests, then many non-living things have interests and, so, have moral standing.

In defense of Goodpaster, I would suggest that Sumner has misinterpreted his intention. Sumner claims that Goodpaster thinks that possession of any end is sufficient for moral standing but I believe that Goodpaster has something narrower in mind, specifically the possession of what I will call a "natural" *telos*. Consider the following passage from Goodpaster's paper.

Nor will it do to suggest, as Feinberg does, that the needs (interests) of living things like trees are not really their own but implicitly ours: "Plants may need things in order to discharge their functions, but

their functions are assigned by human interests, not their own." As if it were human interests that assigned to trees the tasks of growth or maintenance! The interests at stake are clearly those of the living things themselves, not simply those of their owners or users or other human persons involved.

— (Goodpaster, 1978: 319)

Goodpaster distinguishes between interests that are owned, as it were, by a subject and those that belong to the subject's architect or proprietor. Only if the interest is owned by the subject, only if it is a "natural" *telos*, he would say, will the subject have moral standing. Thus, I believe Goodpaster would reject the view that lawnmowers have moral standing in virtue of their function because that function is not natural; it was determined and assigned by human beings.

Still, this move will not save Goodpaster from a charge of inconsistency. Even if one grants that only natural functions certify moral standing he would be wrong to conclude that only living things have natural functions. Rivers, for example, have a natural function of wearing away river banks, forming canyons and so forth, and strong winds can count among their functions that of providing organic matter for forest growth by blowing down trees and leaves. If Goodpaster is right, it would be immoral to dam up rivers or prevent erosion or even brace up saplings for fear of frustrating the natural functions of water and air.

I suspect that Goodpaster would revert this problem to the broader task of providing comparison criteria. He could maintain that rivers, wind or the ozone layer of the atmosphere all have moral

standing but that their interests are secondary to those of living things. Much would hinge on Goodpaster's success at providing a convincing guide for weighing interests.

Beyond this, there is a question as to the justifiability of Goodpaster's preference for "natural" *teloi* over man-made versions. One may speculate about the Aristotelian roots of Goodpaster's view but that will not justify it. In light of this, Sumner's criticism assumes greater force for if the ends of living things insure their moral standing then why not the ends of machines and other implements?

Perhaps Goodpaster could expand his view to include lawnmowers or typewriters and such. It could then be the job of the comparison criteria theory to explain why it is more important to feed the cat than to oil the lawnmower. Doing this would place enormous weight on the success of the theory that determines comparison criteria. It would also trivialize his moral status theory, for if all that Goodpaster's claim means is that everything that has some purpose ought to be respected then it is not very illuminating. Virtually everything either has a "natural" purpose or can be used for something or other.

The "life" criterion then is too broad to be of service. On the other hand, rationality, the last of the suggested criteria for moral standing, is too narrow. Sumner reasons that if an entity had moral status only if it were rational, killing non-human animals would be no more wrong than weeding a garden. However, this is not the case

since the great majority of people think that killing non-human animals is an evil to the animals themselves, an evil which needs to be justified.

Further, Sumner maintains that many human beings would be excluded from the moral community if rationality were required for membership. The group of human incompetents whose status has frequently been cited in this research, would again be disenfranchised under a rationality criterion. Thus, if it is true that the deaths of non-human animals and non-rational humans are not trivial and that we have a duty not to kill them without just cause, then it is also true that they have moral status regardless of their lack of the capacity for rational thought.

Sumner also briefly considers the possibility that the capacity for moral agency, a form of the capacity to reason, could be the criterion for moral agency. He rejects this alternative because, like rationality simpliciter, it is too narrow. He concedes that the class of moral agents is co-extensive with the class of those who have moral duties but denies that it is co-extensive with that of the entire moral community. The moral community includes rights bearers who do not also have moral obligations, for example, all human incompetents, and is thus broader in scope than the class of moral agents.¹⁷

Neither intrinsic value, life nor the capacity to reason will serve as good indicators of moral standing. Thus, the way is clear for

¹⁷Ronald Greene's view, discussed above, contradicts Sumner's intuitions here. If Greene's thesis were defensible then the class of moral agents would be co-extensive with the moral community except where moral agents chose to include "others" in it.

Sumner's defense of sentience as the necessary and sufficient condition for having moral status.

Sentience, he writes,

... is the capacity for feeling or affect. In its most primitive form it is the ability to experience sensations of pleasure and pain, and thus the ability to enjoy and suffer. Its more developed forms include wants, aims, and desires (and thus the ability to be satisfied and frustrated); attitudes, tastes, and values: and moods, emotions, sentiments, and passions.
(Sumner,1981:142)

Sentience is a graduated property that is possessed in varying degrees by various entities. In its primitive form, it is possessed by lower animals and mid-trimester fetuses. Late term fetuses, neonates and higher non-human animals, say cats and dogs, possess it to a greater degree and developed animals with the capacity for psychological "feeling", i.e. aesthetic, intellectual and moral pleasure or insult have the most.

As an inclusion criterion, sentience would encompass all entities that can feel either physically or psychologically. As a comparison criterion, it would assign the greatest moral standing to fully developed sentient entities and diminishing amounts to entities that have less and less capacity for feeling. Sumner concludes:

If all affect and responsivity are absent, and if they cannot be engendered, then (but only then) are we no longer dealing with a sentient creature.
(Sumner,1981:145)

Creatures that cannot feel, physically or psychologically would be beyond the pale of moral concern.

The empirical property indicating the capacity for sentience in the species that we are familiar with is the presence of the forebrain. The degree of its development in an entity will correspond to and indicate the degree of the entity's moral standing.¹⁸ In the case of pre-born humans, Sumner thinks that it is difficult to locate with accuracy the stage of development during which sentience emerges but that certainly there is none at the zygotic or embryonic periods. Zygotes and embryos, then, would lack moral status where fetuses began to acquire some minimal standing and newborn infants quite a lot.

Intuitively, Sumner's view is appealing. A criterion such as his that is at once an inclusion and a comparison criterion is desirable from a strategic standpoint and moderateness, as a rule of thumb, is a pretty steady guide to reasonableness. Further, that an entity can suffer as a result of our treatment of it (or failure to treat) must be a major determinant in whether we count it as "one of us" or not. Intuitively, the sentience criterion must be very close to the mark.

There are two factors, however, that prevent a wholehearted endorsement of it. The first is a worry over its utility as a comparison criterion. Sumner has it that human fetuses and lower non-human animals merit little moral concern because they have very little capacity for sentience. And, further, that we know this

¹⁸Sumner does not rule out the possibility of according moral standing to extraterrestrial creatures. In those cases, we would have to find an analogue to the forebrain to ascertain the degree of moral standing to be accorded. (Sumner, 1981: passim 147-8)

because their forebrains are very little developed. I think that maintaining this line of reasoning will lead Sumner into rough seas. For instance, Sumner assumes that newborn infants are sentient. (Sumner, 1981:148) Yet the forebrain of a newborn infant is considerably less developed than that of a six year old child.¹⁹ And, the "sentience" of a six year old child in terms of moral or aesthetic sensibility is hardly to be compared to that of an adult. Thus, on Sumner's account, the adult should rate highest, then the six year old and finally, the newborn infant.²⁰ Yet, intuitively, it seems that there ought to be no difference in their moral standing. Further, the brains of many primates and cetaceans are better developed than that of newborn human infants. Again, from the point of view of intuitions, it does not seem that bright non-human animals count for more than human infants.

This leads to the second point of difficulty with Sumner's theory. One suspects that one reason why bright non-human animals do not count for more than human infants is that human infants have potential for much greater sentience as they develop. Eventually, if they are average human beings, they will be capable of a much greater range of sentiments than will the brightest chimp or dolphin. If this were not the case then we should hear great protest over the use of vital organs taken from primates to save or extend the lives

¹⁹See, for example, J.Leroy Conel, The Postnatal Development of the Human Cerebral Cortex, Volumes I and VIII, (Cambridge, MA: Harvard University Press, 1967).

²⁰In a land of plenty, the question would be purely one of theory but where there is a need to distribute scarce resources for life itself, then the question of which one "counts" most takes on a practical urgency.

of human infants, as in the 1984 case of *Baby Fae*. The intuitions of most people on that occasion, including those of the chief surgeon, did not at all incline them to suppose that the baboon counted for more than the human infant.²¹

The point is that Sumner's view does not take into account potential for sentience. There seems to be a significant moral difference between entities that constitutionally lack sentience and those that lack it temporarily. As Sumner wrote, it is only when ... "all affect and responsivity are absent, and [when] they cannot be engendered, then (but only then) are we no longer dealing with a sentient creature." (Sumner, 1981:145) Although there is, strictly speaking, no engendering of sentience possible in human embryos and no way of immediately incrementing sentience in human fetuses or infants, if they are but given appropriate support, the higher degree of sentience will come of itself. Thus, it seems that Sumner ought to expand the criterion for moral standing to include entities with constitutional potential for sentience.

If he were to do this, the disturbing inequity in moral standing cited above, between newborns and six year-olds, and again with adults, would dissolve. All three would bear equal moral status, the adult in virtue of its actual sentience; the child and infant in virtue of what they have and what they will have. But, doing it will defeat

²¹In one essay, the author characterized those who protested the use of the baboon's heart because it was a violation of the animal's rights as some who "could safely be called eccentric." ; he also noted that in a carnivorous society such as ours, "the idea of weighing an animal's life equally against a human baby's [was] bizarre." (Charles Krauthammer, "The Using of Baby Fae", (*Time*, December 3, 1984:87-88).

his original thesis that embryos have no moral standing and fetuses have but little. In virtue of their potential for sentience, they would turn out to have as much moral standing as children and adults. Thus, from the point of view of moral intuitions, sentience serves well as an inclusion criterion only if potential for sentience is allowed as part of the criterion.²²

As a comparison criterion, it poses greater difficulties, for it implies that humans of lesser sensibility count for less than those with greater capacities. And, here, even if we include a proviso for potentiality we will end up assigning inferior status to human incompetents. This would mean that in situations where it was impossible to respect the interests of both a competent and an incompetent human, as in the distribution of scarce life support resources, we ought to give preference to the competent human and where there are conflicts between more and less sentient humans, we should prefer a Michaelangelo to a mere Rembrandt (and a run of the mill philosopher wouldn't have a chance). Again, from the point of view of moral intuitions, these consequences rule against accepting sentience as a comparison criterion.

Sumner's defense of the sentience criterion on an intuitive level

²²If, as Sumner says, an entity is non-sentient only where sentience cannot be engendered in it then he should allow that an entity which will display sentience in due time should also have moral standing. All things being equal, if an adult human were not able to emerge from a coma until nine months had passed, I believe Sumner would count him among the sentient. His doing so would have to be based on the adult's potential for sentience not his actual possession of it. Given this, Sumner then should also allow that embryos and fetuses are among the sentient in the same way as the temporarily comatose adult.

does not succeed in the way he would have it. As an inclusion criterion, it is convincing if potentiality for sentience is added in; as a comparison criterion it leads to the counterintuitive conclusion that incompetent humans count for less than competent ones.

3.4 Theoretical Support for the Differential View

Thus far, Sumner's arguments against the liberal and conservative theses and in favor of his differential view have been based on moral intuitions. We saw that Sumner rejected the liberal view because it implied either that birth was the indicator of moral standing, so that things like one's location, accessibility, or physiological autonomy would be morally significant, or that infanticide was morally acceptable. It was through intuition that one was expected to see that infanticide could not be morally acceptable and that one's location, accessibility, or physiological autonomy were morally irrelevant. The conservative view was found lacking in that it allegedly implied that gametes were morally considerable - and, everyone could see that gametes were not morally considerable things. But the differential view was thought to be better because everyone could see that benefit and harm were morally important factors and that actions which caused neither were morally innocuous. Thus it seemed most reasonable to conclude that only and all entities that could suffer or be benefited would be morally considerable.

However, being what they are, intuitions sometimes conflict. And

when they do, there is no justification of one's preference of intuition. For instance, if Sumner sees that infanticide is wrong and Tooley does not, it seems to me that all other things being equal, the most we could say in behalf of Sumner's opinion and against Tooley's would be that Tooley was perhaps morally blind. But he might respond in kind to the effect that Sumner was suffering from some sort of moral hallucination. Or if someone were to declare that good Samaritanism was minimally moral behavior and another saw it as a category of supererogatory action, then there would be no further basis for discussion, for if the criterion of reasonableness is "seeing" that something is right or wrong then there is nothing to be said about a divergent moral opinion other than its holder is either morally callous or a bleeding heart.

This is not to say that moral intuitions have no place in moral reasoning but only that their foundation is not in reason. Hence, there is no way to convince someone, by reason, that their intuitions are true or false.

Yet if moral claims are to be more than assertions of moral sentiments, there must be some way of indicating the worth of moral intuitions. It is to Sumner's considerable credit that he has recognized the futility of arguing only at the intuitive level. He breaks this moral stalemate by requiring that views about moral standing follow from an established moral theory. In this way, he provides a way of justifying one's choice of moral status indicator beyond the fact that it would include entities we feel ought to be included and exclude those we feel are not morally considerable. A

justification by appeal to an established moral theory will be less subjective, less culture-bound and hopefully more conclusive than the appeal to moral intuitions.

One might rejoin, however, that laudable as this strategy may seem, Sumner has only moved the discussion a step backwards, for even if his view is supported by a credible moral theory, in his case, by classical utilitarianism, the liberal's and conservative's views may well be implied by some other established moral theory.²³ In such a case, we would end up with consistent, self-contained but incompatible conclusions about moral status. Each view will turn out to be theory bound.

There is also another sense in which Sumner may be moving the discussion but a step backwards. This is that the basis of moral theories themselves may well be built on the shifting sands of moral intuitions. How else are we to account for Mill's or Bentham's "seeing" that maximizing happiness was the key to morality or Aristotle's fascination with living in accordance to one's "nature" or Kant's attention to the dignity of moral agents and our duties thereon. There is sufficient disagreement in the current literature on the foundations of morality to justify at least a suspicion that deriving a particular moral claim or principle from an established

²³ Recall from above that Sumner contended that there was no deeper theory that could justify the liberal claim without also justifying infanticide and that the conservative's view had its roots in natural law theory. However, if infanticide was not thought to be necessarily wrong, the liberal as well as the conservative view would be grounded in a deeper moral theory.

moral theory may not prove any more an "objective" defense of it than an appeal to intuitions simpliciter.

This does not take away from the helpfulness of Sumner's insight. That two distinct strategies are employed to justify moral claims is a most illuminating observation, one that helps understand and organize arguments to be analyzed. But it does dampen enthusiasm for this aspect of Sumner's defense.

With dampened enthusiasm, then, let us look at that defense. His claim is twofold; first, that the best form of utilitarianism is classical utilitarianism, and second, that his view on abortion, including the graduated status of fetuses, is derivable from classical utilitarianism.

It is beyond the scope and purpose of this dissertation to assess the validity of Sumner's characterization of his preferred ethical theory as that of classical utilitarianism. Suffice to say that he devotes Chapter 5 of his text to a discussion of the various models of utilitarian thought and settles on a very general version which he refers to as classical utilitarianism. It defines moral behavior in terms of achieving the greatest net social utility, where utility is taken to mean enjoyment and disutility, suffering. For example, he writes:

But when we choose a course of action on the ground of its benefits (to those who gain by it) over the costs (to those who lose) is more favorable than that produced by any alternative, we are aiming at the greatest net social utility. *And that is all that utilitarianism requires that we be able to do.* (Sumner, 1981:186)

Now, if the criterion of right action is the production of enjoyment, it only stands to reason that actions will have a moral quality when they affect the enjoyment of some creature(s) either positively or negatively. Here then is the justification of sentience as the indicator of moral standing. Wherever a creature has the capacity for enjoyment or suffering, that creature is *de facto* a member of the moral community whose utility must be taken into account. Sumner explains it thus:

Utilitarian impartiality requires that the utilities of all creatures affected by an action be included in calculating the social utility of that action, and that utility count regardless of its location. All and only sentient beings are capable of having experiences they like or dislike. All and only sentient beings, therefore, have utilities. If having moral standing means having one's utility included in the calculus, sentience must be the criterion of moral standing. A criterion that included any nonsentient beings would be redundant, and a criterion that excluded any sentient beings would be discriminatory.
(Sumner, 1981:198)

It seems to me that Sumner's claim that this utilitarian view implies a sentience criterion of moral standing is correct. If morality is about causing enjoyment and avoiding suffering then all and only those entities that have the capacity for these are moral objects.²⁴

²⁴Goodpaster comes to much the same conclusion; he writes, "...if one's conception of the good is *hedonistic* in character, one's conception of a beneficiary will quite naturally be restricted to beings who are capable of pleasure and pain. If pleasure or satisfaction is the only ultimate gift we have to give, morally, then it is to be expected that only those equipped to receive such a gift will enter into our moral deliberation.

Sumner's use of sentience as a comparison criterion also follows: where a creature is capable of only limited enjoyment, its utility will not be as great as that of a more sentient being who is capable not only of physical sensation but of emotional, aesthetic or intellectual sentiment as well. Thus, the interests of a more limited entity, like a fetus, are overridden by those of more a more capacious one, like a an adult woman.

However, as noted above, the use of sentience as a comparison criterion is unfortunate. Sumner appears not to notice the possibility that if sentience is used as a comparison criterion, certain cases of infanticide and the killing of other incompetents will be justified. Neither infants nor, say, the uneducably retarded nor the severely autistic have the capacity for significantly high degrees of enjoyment (though they are more sentient than any fetuses). Thus it would follow that their interests could be overridden by those of developed, fully sentient adults. And if their deaths would produce the greatest social utility it would be right to do away with them.

My objection is perhaps based only on an intuition as opposed to being derived from a moral theory. It is the intuition that it is wrong

And, if pain or dissatisfaction is the only ultimate harm we can cause, then it is to be expected that only those equipped for it will deserve our consideration. There seems, therefore, to be a noncontingent connection between a hedonistic or quasi-hedonistic theory of value and a response to the moral-considerability questions which favors sentience or interest possession (narrowly conceived). (Goodpaster, 1978:321)

to kill incompetents who are personal or social burdens even when their continued existence yields small enjoyment and much difficulty for families and communities. Yet, from a utilitarian perspective, it seems correct to say that, as a last resort, where the life of an entity causes great disutility for one or more adults, its interests are overridden and it is right to end the less sentient being's life. I find it intuitively difficult to accept this stance but cannot fault it on the grounds that it is inconsistent with utilitarian principles.²⁵

In view of this, sentience, as a comparison criterion, must be discounted. And since it follows validly from utilitarian moral theory, we are lead to question the worth of classical utilitarianism itself.

The implications for sentience as an inclusion factor, then, are also bad, for this part of Sumner's defense of it was to show that it was derivable from classical utilitarianism - whose worth we must now question.

Sumner himself must contend with a dilemma. If he keeps sentience as a comparison criterion, he loses his grounding theory

²⁵This may not be so much a criticism of Sumner's particular opinion as one of utilitarian theory in general. Sumner will inherit such utilitarian dilemmas as the apparent rightness of killing those whose expectation of happiness is negative regardless of the level of their sentience, the duty to bring into the world only those whose expectation of happiness is at least positive but preferably higher than the present average and, (to vary an example of Tooley's) the apparent lack of moral difference between killing an already existent but terminally unhappy person and failing to bring such a one into existence.

because since sentience is not a good comparison criterion, classical utilitarianism is of questionable worth. But if classical utilitarianism is suspect, there is no point gained in deriving sentience as an *inclusion* criterion from it.

It seems that as a last resort, Sumner could fall back on moral intuitions - but, on that level, as we have seen, sentience as a comparison criterion still fails. And, as an inclusion criterion, it is plausible if one expands it to include potentiality for sentience along with or in lieu of actual sentience.

3.5 Conclusion

Sumner's appeal to classical utilitarianism yields sentience as an inclusion criterion, which intuitively, has much merit. It would have more, however, if the criterion were expanded to include also the constitutional potential for sentience.

An appeal to classical utilitarianism also serves to confirm sentience as a comparison criterion, and, we have seen that this would justify the inferior status of human incompetents. Beyond this, however, Sumner would do well to notice that the espousal of a classical utilitarian moral theory does more than justify a differential and counterintuitive assignment of moral standing. It justifies a liberal position on the morality of abortion, rather than the moderate one he supposes. Sumner has assumed that a decision

about the morality of abortion was tied exclusively to the moral status of a fetus, where the abortion would be permissible only if the fetus had very little status or none at all. But, in a utilitarian decision about the morality of an abortion, the fetus' moral status would be only one item in the hedonic calculus. The woman's interests as well as that of other relevant parties' would also count in. Thus, whenever they outweighed the fetus' interests - even if the fetus' were as great as an adult human's - it would still be permissible to terminate the pregnancy. Thus, any pregnancy would be, in principle, justifiably terminated where its continuance would serve social disutility. This looks very much more like a liberal position on abortion than a moderate one.

An alliance with classical utilitarianism inherits many difficulties. The priority of social utility creates tough problems for utilitarians as they must justify the apparent rightness of killing even adult human beings when their deaths would serve social utility. Homicide and infanticide as well as abortion all become justifiable options so long as they are the alternative that yields the greatest social utility. As Philip Devine has observed, "The obstacles to a credible utilitarian ethics of homicide...are very great." (Devine,1978:33)

Thus, Sumner's best strategy, though he would not like it much, would be to defend his preferred criterion on the intuitive level. An appeal to classical utilitarianism gives him an unacceptable comparison criterion and commits him to a liberal, not a moderate,

view on the morality of abortion.

In the end, though he has raised important and serious questions for liberals who contend that fetuses have no moral standing and conservatives who think they have as much as anyone, there are serious and important questions that must be answered about the differential view itself.

Chapter 4: William May: A Conservative View

It may be that fetuses possess the property that certifies moral standing from the time of conception. If so, then what is usually called the "conservative view" will be correct. It will be the case, as one Roman Catholic prelate put it, that "the baby, still not born, is a man in the same degree and for the same reason as the mother."¹ In other words, there will be no time from conception through birth that a fetus lacks moral standing. It will always count for as much as any human adult or child.

We have already seen in Michael Tooley's and L.W. Sumner's work reconstructions of defenses of this conservative claim. They discussed the plausibility of proving it by arguing in behalf of a fetus' right to life, from the inviolability of human life in general and from the moral consideration due to potential persons. Such arguments were constructed in behalf of the conservative and have not so far been shown conclusively to have failed, for the reconstructions usually did not reflect an adequate understanding of conservative principles, especially those pertaining to potentiality. It is now time to look at the conservatives own defense of their view.

I would like to focus on William May's work as representative of arguments for the claim that fetuses have moral standing at every point during gestation.

¹Pope Pius XII, address, "Acta Apostolicae Sedis," cited in May, 1974:13.

4.1 Reconstruction of the Argument

May develops his argument in narrative form; it can be reconstructed from such passages as the following:

... being human is not primarily a matter of achievement; rather it is a gift, an endowment that one has not because he has already done something worthwhile or is actually capable of doing something worthwhile but simply because he is and is present (even if hidden in the womb) to his fellow men. On this latter view I am - and you are - a being of moral worth-not because of anything that I have done or actually can do but simply because I am. (May, 198-:24)

I understand May to be disclaiming a "performance" criterion of moral status where entities have standing only if they have the capacity to perform certain acts like having a self-concept or speaking and so forth. He is affirming a humanistic claim for the moral dignity of each member of the species, regardless of its capacities or level of development.²

In another passage, he gives this support for his belief:

The fetus, and we are here concerned with the human fetus, is obviously an entity that is living, that is individuated at least with respect to its parents if not (prior to segmentation) with respect to any possible twins it might have, and that is human. There is an identity *in being* between the zygote, the fetus, the neonate, the child, the adolescent, the adult, the senior citizen. (May, 198-:22)

²John T. Noonan, Jr. a frequently cited conservative author, has expressed a similar view in a statement to the N.Y. legislature: "I myself know only one test for humanity: a being who was conceived by human parents and is potentially capable of human acts. ... We know he is a man because he came of human flesh and is expected, at some point, to be able to perform a human act, to think a human thought." (cited in Callahan, 1971)

Fetuses are to be considered human beings for they are the same beings as the adults they will become.

I believe these two passages are the basis for the premisses of May's argument. Yet another passage lends substance to this assessment:

The teaching [of the Roman Catholic Church] is predicated upon the following beliefs: that fetal life is human life, that every human being is a subject of rights, such as the right to life, that are his because they are God-given (or in humanistic terms, because he is a human being), and not because they have been conferred upon him by society or because he has achieved something through his own personal activity that gives him a claim to rights that others do not possess. (May, 1974:15)

If May were to capsulize his reasoning into a small syllogism, he would most likely write something like the following:

- (1) Each human being has a moral status equal to that of any human being.
- (2) All fetuses are human beings.
- (3) Therefore, each fetus has a moral status equal to that of any human being.

4.2 The First Premiss: A Humanistic Principle

The first premiss is a humanistic principle. It is based on a thesis that is, to use Noonan's words, "... a refusal to discriminate among human beings on the basis of their varying potentialities." (Noonan, 1970:51) Expanding, we may say that it implies that, for example, differences in physical, intellectual or social status are

not to imply a difference in moral status among humans. It is not to matter for purposes of moral consideration, whether humans are intellectually gifted or stunted, physically capable or handicapped, healthy or ill, young or old, rich or poor --- whether they are social benefactors or criminals. All are to be entitled to equal consideration, equal respect and protection under the law, just in virtue of their humanity. All that (1) asserts is that among human beings, there is no difference in moral standing. It is a humanistic bid for equal rights for all human beings.

Intuitively, such a humanistic principle presents little difficulty, for its denial calls up images of class privilege and rigid caste systems, of the worst in human history. Yet attractive as it is with so ugly a contrary, we must ask if it can be rationally defended.

May spends some time providing a rationale for the humanistic principle. There are two steps to his reasoning. In the first, he develops a theory of human nature. In the second, he derives the normative claim of equal rights from his conclusions about human nature.

May's understanding of human nature is drawn from the natural law tradition.³ He begins by observing that the term "human" is used in two distinct ways. In one sense, an entity can be said to be human if it is a member of the same biological species as other humans, or, in other words,

Definition (A): S is a human being iff S has a human genotype.⁴

³For instance, he writes, "In common with many moralists in what can be termed the natural law tradition, I conceive the human good...." (May, 1974:18)

⁴To be more precise, May should add, "... or some recognizable variation of the human

The second sense of the term, May writes, "... implies that a human being is not totally *human* when he comes into existence... being human is not something factually given but is rather a process, a growth." (May, 198-:18) Further, the process is "directed."⁵ That is to say,

... There is something or some set of things (what we can call the *human good* or *bonum humanum*) *perfective* of a human being and that human beings are summoned, individually and as members of the human community, to struggle to achieve those goods that are perfective of them.
(May, 1974:18)

It seems fairly clear from this that May is speaking teleologically. Human beings develop in directed patterns; the process of their growth is aimed at a paradigmatic state, the *perfected* state of the mature member of the species. If we know what a mature human being is then we also know the goal towards which every member of the species "struggles." Given all of this, the second sense of "human being" would be:

Definition (B): S is a human being iff S is in the process
of developing the properties that are typical of
mature or "perfect" human being.⁶

genotype," to include cases of trisomies.

⁵The expression is coined by Daniel Callahan in his discussion of the significance of potentiality. (Callahan, 1970: 366-70)

⁶ Callahan develops this notion quite well; for example, he writes, "My working assumption is that, when we speak of *human life*, we must also speak of (a) human potentialities, and (b) potentialities in a direction, i.e. not random potentialities, but potentialities which, speaking teleologically, can...be said to be *directed*. This term does

It is further understood that in order to develop, human beings need certain "goods." Thus if a "perfect" human being is a rational animal, all human beings will require certain things in order to achieve and maintain their rationality. All of them will need life for one can be neither rational nor an animal without it. Further, truth will be needed in order to exercise reason, so, it too, will be a human good. And if human beings are by nature social creatures, they will require justice, friendship and peace to thrive as social entities. All of these goods then will be parts of the *bonum humanum*, that which is needed for a human being by Definition (A) to be also a human being by Definition (B).

I believe that May assumes also that if an entity is a human being in the first sense, it is also one in the second sense for it is part and parcel of having a human genotype to be growing in the direction of "perfect" humanity until one has reached maturity.

A last feature of May's characterization of human nature is that he believes that man's "supreme and absolute good," that which distinguishes him from all other animals, is his capacity for moral agency. (May, 1974:19) Thus, humankind's highest goal is to be able to exercise the capacity to "distinguish between *is* and *ought*, between what men actually are and do and what men ought to be and ought to do." (May, 1974:18)

not imply a *director* but is only meant to be a way of interpreting the apparent fact that human development shows certain characteristic patterns and directions. These patterns and directions are *toward* rationality, individuality, culture-making, language, human relationships, tool-making and so on. It is because we know the whole human career ... and because we know man as a whole ... that we are justified in talking of human beings in terms of their actualized realities and their as yet unrealized potentialities. Our knowledge of the former enables us to speak of the latter, and to speak of the latter in teleological language." (Callahan, 1970: 366)

The next step for May is crucial. Having given a non-normative description of human nature, he now moves to justify claims to those goods that are perfective of human nature:

Because they are real goods corresponding to real needs existing in every human being just because he is human, they generate real rights: each human being has a right to them, a claim on them, precisely because he is a human being and because they are the realities that make a human being more human. (May, 1974:18-9)

According to May, it is precisely because human beings share a common nature that they have common goals. To meet those common goals certain goods are required: life, truth, freedom and so forth. Thus, all human beings, having the same basic human needs, come to have equal rights to life, truth... etc. Rights are generated from human needs for goods that are perfective of human nature.

May also distinguishes between needs that he calls "real" and those that are not. "Real" needs correspond to "real" goods which are goods perfective of human nature. Human beings have rights only to "real" goods. Ruled out then are any alleged rights to things that hinder the humanization process or demean or harm human beings. No one would have the right to help in cultivating ignorance, ill health or antisocial behavior.

If the reasoning above is correct then one can account for the rightness of providing individual humans with what they need to develop their human capacities, great or meagre, and for the wrongness of depriving any human of life or liberty, health care or the opportunity for learning.

It is appropriate here to resurrect Sumner's criticism of conservatives on the grounds that, from the perspective of moral intuitions, their position was chauvinistic. Thus far, May has shown that human beings have rights to develop their human capacities, great or meagre and so forth. But he has not given reason to suppose that non-human animals lack rights to develop their capacities, even if their only capacity is managing to stay alive. If he and other conservatives were willing to accord this courtesy to members of all species, certainly they would not be chauvinistic.

But May, for one, does not believe that animals have any rights, not even the right to life. He is quite clear about his belief that membership in the human species has a special moral significance. In an endnote, he explains why he thinks there is a difference in kind between animals with a human genetic code and other animals and why that difference has moral ramifications:

My basic point is that being a human being does make a significant moral difference because the difference between man and other animals demands, for its sufficient explanation, the presence within man's makeup, that is, within his being, of an element not found at all in other animals, namely spirit.

(May,1974:34)

What he asserts is that all and only human beings have spirits and, thus, only they have "human" rights. I assume that this implies that entities that lack spirits, regardless of their capacities for speech and reason, lack any rights at all.

One wishes that May had not added this bit of clarification. His reasoning in the main body of the paper would have committed him,

at the most, to an acknowledgment of some animal rights, but that seems to be less of an embarrassment than the need to explain how he knows that only animals with a human genetic code have spirits, especially without appealing to capacities as evidence of its presence. Further, the task of explaining why it is that only enspirited beings have rights seems also quite formidable. But, since May has left it that non-human animals have no rights, it is fair to say that his construal of the rationale for Premiss I is, in fact, chauvinistic.

However, if a conservative were to disagree with May on the topic of spirits and allow that non-human animals had at least a prima facie right not to be killed, they would not, as Sumner charged, be chauvinistic.

Beyond this, for the defense of (1) to be satisfactory, it must also genuinely follow from natural law theory and natural law theory must itself be true. Both criteria are difficult enough but the second presents the greater problem. Criticisms of natural law theory are not new. Two are pertinent here. The first would contest the validity of May's very quick move from the having of human needs to the possession of corresponding rights, on the grounds that ... "Because they are real goods corresponding to real needs ... they generate real rights." (May, 1974:18) This is a move from a non-normative to a normative proposition, or a derivation of an "ought" from an "is" statement. Natural law theory assumes that because human beings display patterns of directed development, it is morally right for them to do so; because they are developing towards maturity, they ought to develop towards maturity. But, as Hume

observed long ago, the move from "is" to "ought" is an illicit one.

Considerable discussion has been joined since Hume's time over the validity of deriving normative statements from non-normative ones. And, though I am not prepared to defend either side of the issue here, it seems to me that the body of literature devoted to the problem must at least give us reason to pause before assenting to the natural law supposition that because something is a natural human goal it ought to be met.

Aside from the logic problem for natural law theory, it has been criticized for its assumption that there is "a" human nature. Daniel Callahan, for instance, reviewed the conflicting opinions of zoologists over what is known as the "species problem", i.e. the debate over which are appropriate criteria for characterizing a species. (Callahan,1970:356-364)

Opinion appears to be divided into two schools of thought, the "typological" and the "population." The typological concept, writes Callahan,

... is Platonic: it begins with the assumption that each species manifests an "idea," some common, underlying trait which a given specimen manifests and which is shared by other specimens of the species: "The typological species concept treats species merely as random aggregates of individuals which have the 'essential properties' of the 'type' of the species." (Callahan,1970:358)

The population concept is a newer (late '30s- early '40s) method of classification. A "nature" is a composite picture, as it were, of all the members of a population. Similarities and differences among

all members of a population are computed and averaged out statistically to generate a picture of the typical member. Entities are then classified as members of the population or species if they have characteristics that are statistically average for its members. For instance, where individuals in a population, P, on the (numerically determined) average possessed properties a,c,d and r but not s or t, then any entity with a,c,d and r but not s or t would be said to be a member of P.

The population concept yields a more fluid schema than the typological. Being a human being would mean having the properties possessed on the average in a given population of humans - something that may change from population to population over time or according to geographical location. On the typological model, however, being human means closely resembling an archetypal human, the characterization of which never changes.

The significance of the "species problem" for a discussion of human nature is obvious. It becomes extremely difficult to maintain a single-character description of the human species in face of it.

Further, a number of anthropologists describe human nature in terms of the interrelationship of the biological with the psychological and the cultural. (cf Callahan,1970:360-61) Humans are thought to be much more than animals with a certain genotype: they are animals with personalities, behaviors and interpersonal relationships. Being a member of the human species appears to go considerably beyond the possession of a human genotype and the capacity to develop in the direction of human "perfection."

However, it would be unfair to both the conservative and the

humanist to let it go at the unspoken implication that recent work in zoology and anthropology shows that a population concept of human nature defeats the humanistic principle that is premiss (1).

Certainly there must be some universal notion of humanity or it would be impossible for zoologists and anthropologists to pick out a population as a human population in the first place.

Also, May could argue his case by saying that what the anthropologists have found is not a new and changing concept of human nature but rather a variety of ways in which intellectual, social, moral and cultural goals have been met. It might not be the case that those goals were absent in certain human populations and, hence, not normal for some human beings, but only that the various cultures expressed them differently. For example, he might say that moral agency is normal or essential for human beings without requiring that every society have the same moral code. What would pose a serious threat to May's view would be the discovery of a population of human beings where, on the average, the members were incapable of moral decision making or lacked even the capacity to think or judge. I don't know if even a populationist would call this a human population. But if he did, there would be a conflict with May's position. Otherwise, the two do not seem to be incompatible.

It is the problem of deriving the normative from the non-normative that is the more serious difficulty for premiss (1). And I can see no way to circumvent it. What can be said is that this is a problem for natural law theory, just as the apparent legitimacy of suppressing individual rights is a problem for classical utilitarian theory. We do not have at this point any "fullproof" normative theory

and so premiss (1) is perhaps as solidly based a principle as we can hope for in the realm of applied ethics.⁷

4.3 The Second Premiss: the Fetus' Species

Though premiss (1) is the mainstay of liberal thought, just the opposite is true of premiss (2). The assertion of fetal humanity marks the point where liberals and conservatives part ways. As Roger Wertheimer has put it, the liberal cannot make sense of a claim that would have newly fertilized ova and adult persons be the same kind of being. Such an assertion, he says ...

... is not simply false, but wildly, madly false, it is nonsense, totally unintelligible, literally unbelievable. Just look at an embryo. It is an amorphous speck of apparently coagulated protoplasm. It has no eyes or ears, no head at all. It can't walk or talk; you can't dress or wash it. Why it doesn't even qualify as a Barbie doll, and yet millions of people call it a human being, just like one of us.

(Wertheimer, 1971, in Feinberg, 1984:46)

What could motivate a conservative to maintain such an unintuitive stance? As a number of authors have thought, it is like pointing to an acorn and pronouncing it an oak tree.

May, as a conservative, sets appearances aside and maintains that

⁷I have not directly addressed Sumner's criticism of conservatives on account of the "species chauvinism" implied in a "humanistic principle." However, I do not think that it is a serious criticism unless conservatives insist that non-human animals have no rights to the goods that they require to reach the goals peculiar to their species. If they will allow that we have at least a *prima facie* obligation not to frustrate their "struggle", the humanistic principle will be good as an application of a more general principle that all living things ought to fulfill their "natures."

the amorphous specks of apparently coagulated protoplasm are indeed "one of us." He gives two reasons to support of his assertion.

The first is that biomedical science shows that at conception a new organism comes into being. It is distinct from its parents, genetically unique (unless there is twinning, in which case the "unique" genetic code is duplicated) and the new organism has the capacity to complete its development without any further stimulus from outside. The data from biomedical research, he contends, are "reality-making" factors. They paint a picture of fetuses that shows that in spite of their appearance, they are identifiable members of the human species - not parts of the mother, gametic material or mere blueprints.

May's second reason for thinking that all fetuses are human beings is that they are the same entity as a later entity that is undoubtedly a human being. He reasons that if fetus and adult are the same being, they must assuredly be of the same species. For instance, he writes:

There is an identity in being between the zygote, the fetus, the neonate, the child, the adolescent, the adult, the senior citizen. (May, 1974:22)

It is a view, I believe, that assumes that human beings as well as some other entities are substances whose properties may change over time but which nevertheless remain the same being. Thus a human being, though it had at the beginning of its life few of the properties that would characterize it when it is an adult would nonetheless be the same being as the adult. And, if, as an adult, it is

a member of the species *homo sapiens*, then, as an embryo, it would also have been a member of that species and vice versa. There is no point in development, May would say, when the fetus-later child-later adult undergoes an essential change, i.e. goes from being one kind of entity to being another. The entity that resulted from the fertilization of a human ovum by a human sperm is the same one that is later an adult human being.

There is an intuitive plausibility to the view. Modern obstetric practice and fetal medicine, for instance, affirm a continuum in human growth and development that begins at conception and continues to maturation.⁸ Geneticists have also traced the source of various abnormalities to irregular patterns of cell division in the conceptus. And, of course, the effects of maternal diet, drug and alcohol use during pregnancy are recognized as significant factors in infant health. All this lends support to May's claim. It seems most reasonable to believe, for instance, that the entity that was undergoing deviant mitosis patterns one day after conception is the same one that now has Down's syndrome one year after birth.

May's "sameness of being" claim, however, is not justified primarily by its intuitive appeal. It is more substantially grounded in Aristotelian principles of potentiality. It is because the fetus has the active potential to develop into an adult human being that May knows it will be the same being as a later adult human being.

Francis C. Wade, another conservative author, has explained the

⁸For example, Mary Lou Moore writes, "Growth and development follow very specific patterns in an orderly sequence. Both are part of a continuum for many years after birth, Realities in Childbearing, (W.B. Saunders C., 1983:182).

view most clearly. He writes,

The central purpose of the Aristotelian notion of potency is to explain continuity, both in becoming (one being acquires a new characteristic) and in generation-corruption (where one being is turned into another kind of being.) If one denies continuity in change, he will have little use for potentiality, at least little use for the Aristotelian types. And there are types that should not be conflated: one to account for continuity in becoming and generation, another to account for continuity of a being going from not acting to acting. The first type, where something happens to a being, is called passive potency; the second type, where a being itself actively does something, is predictably called active potency.

(Wade, 1975:239)

Wade has articulated in a detailed way what May seeks to convey in his assertion that there is an identity in being between a fetus and a later human being. The fetus, itself, develops into an adult. Further, to follow Wade, the fetus must so develop for not only does it have an active potential to do so but its active potential is natural as opposed to specifiable. (Wade, 1975: 243-5)

Wade is appealing to a further Aristotelian distinction between the capacity of an entity to change either as a result of a choice it can make (specifiable potency) or as a result of its very nature (natural potency) or, as we might say today, because of its genetic "programming." The fact that fetuses will change i.e. develop into adults, is not open to any choice on their part; they must so develop. Hence, there is a guarantee that we have before us an entity that is the same being as a human being and so, is itself a human being.

To quote Wade further ...

Where the future is prescribed, then it is present in that

prescription. The genotype is actually in the present its potential future because its constitutional prescription in the present will control and guarantee the future.

... The potentiality of the fetus to become an adult is not a passive potency, which is neutral to the future; nor a specifiable active potentiality, which is a very "iffy" promise, but is an active natural potentiality or tendency, which is a guarantee of the future as far as the agent is concerned.
(Wade, 1975:245)

In spite of its intuitive appeal and theoretical support, not everyone would agree with the claim that every unborn human is the same being as a later human being. No one is saying that fetuses are not humans in the sense that they are fetuses of another species, but there is considerable difference of opinion over whether they are human beings as opposed to human things. If they are but human things, they are not the same beings as later human beings. Only if fetuses are human beings to start off with can they share an identity with a later human being.

First of all, there is a difference of opinion among writers in the Aristotelian tradition itself. Some authors, notably Aristotle and St. Thomas, claimed that the early fetus, though physically continuous with the mid-term fetus, was not the same being because it had undergone an essential change. They believed it had made a transition from a vegetative form of life to an animal form of life and in so doing had developed from a human thing (as a human heart or human tissue are human things) into a human being, an individual member of the species *homo sapiens*.

A second line of objection derives from out of the Aristotelian

tradition, from Lockean and post-Lockean ontological analyses where the language of substance is abandoned.

To attempt a response in May's behalf to this second objection is beyond the bounds of what can be done here. As in the previous chapter where the issue was between ontologies of substance over those of processes, we cannot hope to provide adequate grounds for deciding in favor of one ontological system over another. It must be sufficient to note that the locus of one's metaphysical sympathies will more than likely determine one's willingness to continue thinking about May's view.

For our purposes here, we will suppose that an Aristotelian ontology of substance is still defensible. We may then focus on objections to May's claim levelled from within the Aristotelian tradition.

4.3.1 Joseph Donceel: The Hylomorphic Theory

One such objection is raised by Joseph F. Donceel, S.J., in his paper, "A Liberal Catholic's View" (Feinberg, 1984:15-20). The objection is derived from the hylomorphic theory which he espouses. According to that doctrine, the soul is the formal cause of a human being. It is that which gives it its shape (as the form of a statue informs a block of marble). Thus, it is not until a body displays the peculiarly human shape that it can be said to be ensouled or animated. This is the time when it is genuinely a human being. A being certainly exists prior to animation but it is not a human being until it has a distinctively human form. This view, which claims that

there is a time span during which a fetus is not a human being until animated, is generally known as the theory of delayed or mediate animation.

An important point that Donceel stresses about his view is that it is not to be confused with dualism. Dualism contends that the soul is a complete substance able to exist independently of the body to which it temporarily attaches and thus, theoretically, could exist in any kind of body. A single celled zygote could serve nicely. In which case, a human soul could be present at conception thereby casting doubt upon the theory of delayed animation.

The hylomorphist understands the soul as an incomplete substance, something that does not exist outside of or independently of a body, for it is the very form of the body. Donceel would say then that displaying a human form is a necessary and sufficient condition for being a human being.

From what embryology has shown, it is not until the sixth or seventh week of gestation that the fetus has developed basic organs and looks more human than not.⁹ Prior to this time, it would be presumed that the fetus, though a human thing, was not yet a human being.

There is something to be said for this view. Though it lacks the elegance of May's simple identity, it captures the roots of an uneasiness over calling a morula, a blastula or a C-shaped, 4mm. long, betailed entity a human being. Neither the zygote's morphology nor its physiology match ours.

Donceel's view also avoids the worrisome facts that part of the

⁹I am judging from illustrations in Arcy, Developmental Anatomy: A Textbook and Laboratory Manual of Embryology. (W.B. Saunders Co, 1974).

conceptus develops into the amnion and that the entire conceptus may divide to duplicate itself. In a sense, there is just too much in a very early fetus for us to think of it as a human being; human beings, intuitively, are not the kinds of things that can sprout a cocoon like shelter or divide to become two entities.

Nonetheless, I believe that Donceel's view creates more problems than it solves. For one thing, he does not explain how it is that the soul comes to inform the embryo's body. That body has been in the process of acquiring a human form over a period of some weeks - presumably without the benefit of help from a human soul. Did the soul then only put on the finishing touches? Or had it been slipping into the body gradually, infiltrating rather than being inserted all at once? Further, Donceel does not indicate a criterion for determining when there is a complete human form. Would a general outline with rudimentary organs suffice or would the body not be animated until the organs were functional and the form refined? And, finally, if the soul is the form of the body and nothing else then it seems that talk about souls is superfluous. Why not simply say that something is a member of the human species when it looks like an adult human being?

4.3.2 Lawrence Becker: The Form Criterion

This latter strategy is adopted by Lawrence Becker (Becker, 1975). He has proposed that an entity becomes a human being when the metamorphosis from a human-becoming to a human-being is complete:

... the metamorphic phase of human generative development (i.e. the fundamental differentiation) is complete when (1) the organism has assumed its basic gross anatomical form, normal or not (by which I mean basic skeletal structure, musculature, arrangement of organ mass and distribution of tissues); (2) the organism's inventory (normal or not) of histologically differentiated organs is complete. (Becker, 1975:343)

He is stipulating that a human form is necessary for humanity proper and that the form must be quite refined for the fetus to count as a member of the species. His reasoning is that until this point of development, the fetus is still evolving towards its final form. Beyond this point of development it merely grows and matures. He feels confident that by about six and one half months gestation a fetus has achieved its form. It is no longer becoming but actually is a bona fide member of *homo sapiens*.

Becker's argument for this thesis is analogical. He proposes that we understand the development of a fetus into a human being as akin to that of the metamorphosis of a caterpillar into a butterfly. He suggests that as it would be inaccurate to call a pupa or a larvae a butterfly, so it would be to call an early fetus a human being.

The analogy is not very good because the caterpillar, strictly speaking, never becomes a butterfly. Rather it carries the butterfly embryo within itself and that is what eventually emerges as a butterfly. Further, even if someone thought that a caterpillar became a butterfly, they would not be justified in believing that caterpillars were butterfly things, like butterfly wings or butterfly antennae. Any given caterpillar is a unique entity of the same species of

insect as the butterfly from which it came; it is a butterfly at the larva stage.¹⁰

In view of these inaccuracies, Becker's argument is not compelling. But there appears to be no reason why we could not take his view simply as a proposal to use form as an indicator of humanity along with the stipulation that "form" means "refined or completed form."

We would then have two separate assessments of what it means to have a distinctively human form. The one would say that a fetus became a human being when it displayed a minimally identifiable human shape, the other when its development was virtually complete.¹¹ With no way to judge between the two, one would conclude that if form is to be an indication of humanity, a fetus becomes a human being at any time from two to seven months gestation. Further, the preference of an earlier date when the form is just discernible or a later one when the metamorphosis is almost complete appears to be quite arbitrary.

The looseness of the time boundaries, however, seems not to spoil Donceel's or Becker's efforts to rebut a conservative position because, if their reasoning is good, there is no human being for at

¹⁰It is easy to assume that, (i) "This entity is a butterfly at the larva stage," means the same as (ii) "This entity is a butterfly larva." However, it may or may not be the case because (ii) is ambiguous between, (iii) "This entity is a butterfly, a lepidopterous insect that is at the larva stage of its development" and (iv) "This entity is a butterfly larva, a butterfly thing." (i) and (ii) mean the same only where (ii) is the same as (iii) and not (iv).

¹¹Oddly enough, Becker does not think that the development of reproductive organs or anything like social or intellectual development are necessary for an entity to be properly thought of as a human being. But it seems that he should require these for the sake of consistency.

least six or seven weeks after conception and perhaps none for up to seven months. In either case, Premiss (2) would be false because not all unborn humans would be human beings; at the zygotic stage and during at least some of the embryonic, they lack even a rudimentary human form.

At this point, it becomes difficult to choose between May's view and Donceel's and Becker's. Both alternatives have merit.

May would say:

- (1) S is a human being at t_1^- iff S has active
natural potential for becoming an entity S'
which is a human being at t_{1+n} ,

and Becker,

- (2) S is a human being iff S has a human form,
i.e. the form typical of adult human beings.

(1) is appealing because we know that fetuses develop into adult human beings and that they are at least physically continuous with them and because it has the weight of embryonic science behind it. Still, (2) is attractive because physical likeness is also part of identifying an entity now as the same one that existed earlier.

The most I would venture to say at this point is that (2) is a bit more plausible than (1) because the physical continuity appealed to in (1) is very murky. Recall that zygotes are also continuous with amnionic sacs and sometimes two or more embryos. Thus, in a sense, zygotes are physically continuous with a later member of the human species but in another sense, they are not. For instance, it would be wrong to say that *this* zygote was physically continuous with Jane,

a later member of the species, because that zygote would also be physically continuous with the amnionic sac in which Jane, as a fetus, will be enclosed and, perhaps with Jean, Jane's twin, and her amnionic sac.

At least, if a fetus displays a human form, we know that *it* is physically continuous with a later human being. Thus, the presence of a human form can serve both to indicate that an entity is a member of the human species and to insure the presence of *one* individual that is a human being and physically continuous with *one* later entity which is also a human being. A form criterion would indicate individuation as well as species membership.

4.3.3 Gareth Matthews: The Psychological Criterion

There is another proposal which, if plausible, would be consistent with the form criterion but not with May's version of a continuity norm. The argument is proposed by Gareth Matthews in his paper, "Life and Death as the Arrival and Departure of the Psyche" (Matthews, 1979). He suggests, in essence, that there is no human being unless there is a living human entity that is possessed of a psyche:

The life of a human being begins when a human body is first invested with a soul or psyche, and it ends when that body is last invested with a soul or psyche. (Matthews, 1979:151)

To have a soul or psyche, Matthews contends, is to be alive in the

way that animals are alive. To be a human being then is, at least, to be an animal. Thus, though conservatives are right, in a sense, that even zygotes are the same beings as later human beings, they may not be justified in their claim that the zygote's and embryo's life is the life of a human being. If Matthews is correct, they will have to show further that zygotes and embryos are alive in the way that animals are alive, viz. that they possess souls or psyches.

The notion of soul as the essence of animal life is not new, Matthews reminds us. His analysis of life is drawn from the Aristotelian distinction among vegetative, animal and human life. For instance, he writes that ...

... [Aristotle] seems to suggest that the Greek word for "to live" has one sense in which both plants and animals can be said to live, another in which animals but not plants, can be said to live, and a third in which human beings, but not animals or, of course, plants, can be said to live (De Anima B₂). (Matthews, 1979:152)

In trying to determine whether or not a given fetus is a human being then, one would be tempted to decide on the basis of the life style, as it were, of the fetus in question. Is it alive in the sense in which only human beings are alive? Or perhaps only in the sense in which plants or animals are alive? But first we must know what it means to be alive in any of these senses.

Matthews denies that there is a sense of "to live" that applies only to human beings and not to animals and plants. The several functions that are usually associated with human life, such as speech, judgment, reason, moral agency and so forth are not unique to human beings, he claims. Higher primates, for example, are

capable of sign language where neonates, or certain stroke victims are incapable of speech. One could add that the ability to use tools, develop political strategies and display altruistic behavior have also been observed in primates. Having the capacity for what has been thought to be distinctively human behavior then would be neither a sufficient nor necessary condition for living a human life. Thus trying to decide a fetus' humanity by appealing to the third sense of "to live" is not helpful.

In view of this, Matthews looks to the second sense of "to live," that in which animals but not plants are said to be alive. For to be alive as a rational animal means, at least, to be alive as an animal. When is there first, as Matthews would say, "a little animal?" What function reveals the arrival of an animal soul? He suggests that the distinguishing capacity is psychological control. (Matthews,1979:152,153) i.e. when the entity can act to satisfy desire in accordance with perception. (Matthews,1979:154) This capacity reveals that the entity has a psychology and is thus an animal or, alternatively, that its psyche or soul has "arrived."

The view has much to be said for it. As with Donceel's and Becker's, it avoids identification of one's self with a mass of living cells that bears no physical resemblance to us. A second advantage to Matthews' position is that it squares more with the usual criteria for personal identity over time. By this I mean that in discussions of personal identity, one ordinarily determines whether S at t_1 is the same being as S at t_2 by looking to see whether S at t_1 is physically continuous with S at t_2 . Where S is a psychological being, we also look for psychological connectedness between S at t_1 and S at t_2 .

The case for personal identity would be even stronger if S at t_2 could remember S at t_1 and S at all or most all of the times between t_1 and t_2 .

When May and other conservatives claim an identity in being from conception to death as an adult human being, they are saying that S at t_1 is the same being as S at t_2 on the basis, initially, of only physical continuity between the two. But, since in this case, S at t_2 is a psychological being, it would seem that this is not enough. There ought also to be psychological connectedness which, of course, is impossible when one of the partners, S at t_1 , lacks a psychology. But, if the identity is asserted only once there is a psyche, something Matthews' view would insure, it would make much more sense to say that S at t_2 was, in fact, the same person as S at t_1 .

Best of all would be if S at t_2 could also remember S at t_1 , but since there is little evidence of intrauterine memories, we cannot with any confidence assert that S at t_2 has memories of S at t_1 .

Nonetheless, it is plausible to think that where S at t_1 is a fetus that shows evidence of psychological behavior, which may be psychologically connected and physically continuous with a later human being, S at t_2 , that S at t_1 is the same being as S at t_2 . Certainly it is more plausible to say this than to assert the identity of an adult human being with an embryo that lacks psychological capacities and even less plausible to assert it with a zygote whose physical continuity with the adult is conceptually murky.

That Matthews' view has advantages from the point of view of questions about personal identity over time is not part of his defense of it. He, himself, defends the psychological criterion with a

negative argument; he argues that conception, viability and birth are not defensible thresholds of humanity.

His reflections on the inadequacy of conception as a threshold of humanity are a counterargument to May's view. They are drawn from the phenomenon of twinning and can be expressed as a syllogism:

- (i) No human being has *within itself* the potentiality to become two human beings.
 - (ii) Every one-celled zygote has within itself the potentiality to become two human beings.
 - (iii) Therefore, no one-celled zygote is a human being.
- (Matthews, 1979:154)

Matthews' criticism is direct, he points out an essential difference between one-celled zygotes and human beings, viz. that the latter never have, within themselves, the capacity to twin and the former do. Hence, one-celled zygotes cannot be human beings.

The first premiss seems true enough especially keeping in mind the distinction between potentialities that are "within" and those that are "without." Potentiality that is "within" an entity is generally thought to be active potential or a capacity that can or will be exercised if nothing blocks its development or expression. For example, an athlete has "within" himself the potential to run a four minute mile; he can do it if it doesn't rain at the appointed time or if no one steals his running shoes. I, on the contrary, even with ideal meteorological conditions and in my Sunday Nikes, have not that capacity. He has an active potential that I lack. I might have a passive potential for it though. Some "outside" factor like steroid or other drug injection could let me match the feat.

If we keep clear this distinction, premiss (i) is uncontroversial. Premiss (ii), however, is troublesome. The zygote's potential for twinning seems not to be altogether "within" itself. There seems also to be a passive element in the twinning process because, as Matthews observes, the "current research suggests that whether a given zygote twins is a question of its chemical environment and not a question of its genetic makeup." (Matthews, 1979:154) This suggests to me that the potential to twin is not entirely within the zygote but rather a phenomenon caused by factors from without. At any rate, the distinction is not as clear as Matthews would have it with the result that the counterargument is not as conclusive as one would like it to be.

But perhaps Matthews does not need the negative argument. The animation criterion may be strong enough to stand on its own. It is a more reasonable standard of identity than May's solitary physical continuity criterion and it is more intuitive.

It also avoids depending on a specific ontological theory and so would avoid a criticism of being theory-bound. Psyche, or soul, it seems to me can be interpreted equally as an independent substance that joins to the body and animates it (dualism) or as a brain and neuronal system that makes psychological behavior possible (identity materialism) or as a function that becomes possible at a given point in fetal development and thus signals the "arrival" of a mind (functionalism). The theory can be adapted to one's favorite philosophy of mind. All that Matthews requires is that there be a mind (psyche, soul) "present" in the body before it can be meaningfully called a human being.

He predicts that research will show that the fetus is capable of psychological behavior at about thirteen or fourteen weeks of gestation, "sometime early in the second trimester." This is after the time when it is capable only of reflex action and when the sensory nervous system is sufficiently developed to enable it to interpret its environment and act in response to that interpretation. He cites as a supporting example an instance of sweetening amniotic fluid with the result that the fetus swallowed greater than usual amounts of it, thus indicating a preference, a sort of decision made. The fetus' behavior cannot be fully explained without an appeal to motivation. Thus, it does seem like a good example of psychological behavior.¹²

A worry that I have with this view, however, is its silence on the topic of human potentiality. Matthews is clear about using the presence of psyche as a criterion for humanity at both the beginning and at the end of life. (Matthews, 1979:156) But there is a significant difference between the embryo's lack of psychological control at the beginning of life and that evidenced by a human being at the end of life. The difference is one of potential.

The irreversibly comatose human not only lacks psychological control but any potential for it as well, whereas even an embryo, and in some sense a zygote, has active natural potential for psychological life. It is not yet alive exactly in the way animals are alive but neither is it alive in the way that plants are alive nor in

¹²What would turn the example into more conclusive proof of psychological behavior would be complimentary experiments where certain fetuses were observed not to swallow greater amounts of sweetened fluid. The increased swallowing behavior would then more clearly be an indication of preference.

the way that debilitated humans at the end of life are alive.

The potential for psychological behavior then seems to put early fetuses in a unique class. Their immediate "behavior", to be sure, indicates life in the way that plants have it but their directed development towards genuine psychological behavior makes their life unlike the life of any plant. Further, their lack of psychological control is unlike that of the irreversibly comatose human being in that its absence is but temporary. All of this is extremely puzzling; early fetuses are certainly not dead but neither are they alive as plants are alive or as animals are alive. The conclusion that presents itself here is that the traditional categories are not adequate for describing the reality of the fetus.

Thus, I do not think that a fetus' humanity can be determined only by its immediate capacity for psychological behavior. The fact that prior to acquiring that capacity, it is inexorably developing in such a way that it must have it, precludes a neat categorization.

Nonetheless, I believe that from the perspective of establishing a possible relationship of personal identity between adult humans and fetuses, Matthews' criterion for the "arrival" of the psyche is invaluable. For, there can be no psychological connectedness with an entity that lacks a psychology.

Is May correct in his assertion that all fetuses are human beings and not mere human things. The support that he gains for his claim from the biomedical sciences cannot be ignored. For instance, it makes no sense at all to think of a human heart or a human liver as a patient but it is common practice to think of and to treat a fetus as such. Human things like human tissue or organs have no interests of

their own whereas fetal medicine treats even zygotes as having interests of their own, interests that may conflict with the pregnant woman's interests. Further, the physical continuity between at least a differentiated fetus and a later human being lends conceptual support to May's claim as does its active natural potential for developing typically human behavior and form.

Donceel's appeal to hylomorphism does not weaken May's position because, for one thing, as he himself points out, hylomorphism today is held in disrepute. Talk about souls being infused into bodies and giving them their form is not very enlightening especially considering the imprecision of the notion of "form" itself and the difficulty of accounting for the directedness of the fetus' development prior to its display of a distinctively human form. Though Becker's view avoids the difficulties that attach to hylomorphism as a theory, it shares with hylomorphism the inability to explain why an entity that is developing a refined human form falls into the category of human thing rather than that of human being.

Matthews gives reason to consider a deeper and more significant change in the fetus' development, a change that can be more cogently construed as a transition from the status of "human thing" to "human being" than Becker's or Donceel's form criterion. But the view still fails to take into account the fetus' active natural potential for psychological control. If a thing that is now alive as a plant is alive will, very shortly, become alive as an animal is alive, then the thing is not, strictly speaking, alive as a plant is alive because no plant has the active natural potential to become alive as an animal is

alive. I think then, that Matthews has given us a good criterion for deciding when life has ceased but not such a decisive one for deciding when human life begins.¹³

To sum up, then, it is extremely unlikely that even the earliest human fetus is anything but a human being. There is room for debate, I believe, about the status of zygotes because in their case there is not a differentiated *it* that we can point to, as it were, and say that *here* is a human being. Zygotes are a unique class of entities. Paradoxically, they are both human things and human beings and they are neither human things nor human beings. It is their potentiality that makes any classification of them unintelligible. The usual ontological categories are just not serviceable here.

May, then, by and large is correct in his assessment of the fetus' humanity. If we take potentialities seriously, as I think we must, there will be uncertainty only in the case of zygotes because of the inability to discern any discrete entity that is physically continuous with a human being and has the active natural potential to develop into one - as opposed to an entity that is physically continuous with and has the potential to develop into a human thing, an amnion.

4.4 Conclusion

How are we to describe the status of May's argument? The first

¹³One might phrase this criticism in the Aristotelian language of causality where we would say that Matthews has taken into account only the formal cause of the entity but not its material cause, (the genetic stuff out of which it is made), its efficient cause (parentage) nor its final cause (the end to which it develops, that for which it has active potential). Aristotle, I believe, would have us take into account all four causes to determine the nature of a thing.

premiss is a "humanistic principle" that asserts an equality of rights among members of the human species. It affirms that every human being has a *prima facie* right to what it needs to develop into a mature rational animal to whatever degree that that accomplishment was possible. At the least, each human being has a right not to be killed or prevented from acquiring knowledge and exercising freedom to whatever degree he or she is capable.

May draws his defense of the humanistic principle from natural law theory where entities are first of all described in terms of the *telos* that is natural to them. Given that each individual has a degree of perfection toward which it "struggles", May goes on to say that each one had a right to the goods which she or he needs to reach her or his natural end. Hence, since normal developing human beings are developing into rational animals that are social and political beings as well, each has the right to receive what he or she needs to maintain the "struggle." Those who because of a physiological or psychological defect, will not develop into fully rational animals, have rights to develop to the extent they can.

May draws upon the traditional basis for natural rights and the natural dignity of all members of the human species. I think there is no one who will quarrel with him seriously over the humanistic principle.

Nonetheless, as we saw above, May is not open to the possibility that every animal has a *prima facie* right to fulfill its nature; he subscribes to the *humanistic* principle quite literally. He thinks that no no-human animals can have rights. In this he is chauvinistic. But if a conservative were to allow that non-humans also had a

prima facie right, at least of a negative sort, not to be killed or to have their habitats destroyed wantonly, they would not join May in his species chauvinism.

Although conservatives may disagree with May about the rights of non-human animals, I do not see how they can escape the criticism of natural law theory on account of its derivation of a normative claim from a non-normative statement. This is seen by many as a problem for natural law theory in general. Thus, depending on one's position vis a vis the "is-ought" derivation, one is more or less likely to agree with May's reasoning. We cannot hope to reach closure on the issue here.

The humanistic principle that is Premiss I, then, is not so solidly established as might be thought. I cannot resist speculating, however, that this will not shake contemporary society's faith in it. In our culture, at least, it has become a moral axiom.¹⁴

May's second premiss is more secure. He believes that it is quite plausible to claim that all unborn humans are members of *homo sapiens* because biomedical science does not doubt it and because there is an "identity of being" between fetuses and later human beings. I agreed that May's position on the humanity of all fetuses had the support of biomedical science and that this was significant. However, I argued that, conceptually, the case was weaker than he

¹⁴ We assume here that any human beings in question are innocent, i.e. have not done anything that would call for a curtailment of their natural rights, say to bear arms or to assemble or speak freely. Further, to be completely fair, we should allow that, upon reflection, probably most liberals would not agree with the humanistic principle in that they will deny that fetuses, if they are human beings, have moral status or rights equal to other human beings. Their task all along has been to find non-arbitrary reasons for excluding human fetuses.

thought because the physical continuity between a fetus and a later human being was not clear until a point of differentiation. Until then, it is hard to say whether there is a human thing or a human being or some combination of the two.

I did not think that Donceel's or Becker's arguments completely defeated May's position. For different reasons, they claimed that a developing unborn human was a human thing, a "human becoming" (Becker) until it acquired a typically human form. At that point in its development, it became a human being. But there seemed to be no non-arbitrary reason to choose the time at which a human form is first in evidence over that at which it is more refined (or vice versa) as the time when the fetus becomes a human being. Thus, the form criterion turned out to involve an unacceptable degree of arbitrariness. Further, I thought that the fact that pre-formed fetuses were in the process of developing a typically human form i.e. that they had active, natural potential for doing so, set them in a category apart from other human things and marked them as very immature and undeveloped human beings.

I thought that Matthews' argument was a more effective rebuttal of May's claim of "sameness of being" between fetuses and later human beings. On May's account, all fetuses were human beings because they were the same beings as later human beings. But if one leaves potentialities aside, the only "sameness" between early fetuses and later human beings is one of physical continuity, which isn't very much in the way of identity. Matthews thought that prior to the fetus' development of psychological capacities, it was not yet a human being but rather a "proto-human", a human thing that was

alive in the way that plants are alive. My observation was that since the later human being is a psychological being (an animal), it seemed more reasonable to say that any entity that is the same being as a human being must be more than physically continuous with it (as May would have it.) I thought that it should also be psychologically connected to it, something Matthews view would provide for. However, in the end, I could not overlook the proto-human's active, natural potential for psychological control. Such potentiality blurred Matthews' neat distinction between proto-humans and human beings. It seemed to me that having that potential marked the life of proto-humans as different from that of any plant or of any human thing.

It would seem, at this point, reasonable to agree with a weakened version of May's view, i.e. that fetuses, at least from the point of individuation, are members of the human species, that they are human beings and not mere human things. This agreement, however, must be tempered by the recognition that it entails subscribing to several principles of natural law theory. But, as I noted above, natural law theory rests on an illicit "is-ought" derivation. This will be, for many, a sufficient reason to abandon it altogether along with the principles that justify even a weakened version of May's view. Further, it may be that the humanistic principle, even as derived from natural law theory, does not guarantee that any human being has rights equal to any other human beings. It may be the case that in human beings where psychological life is constitutionally impossible to engender, there is not an equality of rights - for there is no "perfection" towards which that human being is "struggling."

Irreversibly comatose human beings thus may be a class of humans that lack moral standing. Also, reasoning from the significance of psychological capacities and potentialities, it would seem that irreversibly comatose humans are human things rather than human beings and so our behavior towards them is not guided by the same considerations as that towards human beings. Someone who believed that irreversibly comatose humans were human beings with full moral standing would then no doubt question the worth of what has been said above.

Another deterrent may be May's insistence on the exclusiveness of natural rights. As we saw earlier, because he believes that all and only human beings have spirits, he concludes that all and only humans have rights. For those who eschew such a display of species chauvinism, May's argument will not be convincing. However, it would not be inconsistent for a conservative to allow that both human and non-human animals have *prima facie* rights, to be determined by their respective *telo*i.

Nonetheless, these difficulties seem to be balanced off by the conservative's understanding of the fetus' "reality." I have found that the conservative's appeal to potentialities remedies a sense of wrongheadedness in moderate and liberal talk about fetuses. In these, the fetus has been treated, it seems, like an alien little specimen, suddenly appeared on the laboratory table, a foreign thing about which nothing is known except what is before our very eyes. Thus have discussions gone 'round and 'round about the significance of a fetus' immediate appearance and behavior. It has seemed all along that this approach was both bad ontology and bad taxonomy.

A fetus at any point of development is not an alien thing. It is not something we know nothing about. We know where it came from as well as where it is going. We know also that in living things, growth and development are entirely normal, that all living things pass through stages of development on their way to maturity. To attempt to categorize a living thing on the basis of its immediate properties alone is bad ontology, for a living thing's past and future are part of what makes it to be the kind of thing it is.

Just as importantly for our purposes here, this approach is also bad taxonomy. Not only adults of a species are classified as members of that species. Others at various stages of development are also placed in the category. Kittens are as much felines as are cats and colts or yearlings are not of different breeds than their sires. And (in response to a frequently made objection to this line of reasoning) though an acorn, to be sure, is not an oak tree but only an oak thing, a germinating acorn or an oak sapling are immature oak trees and hence are not, like the acorn, oak things. All of this is to stress that a living thing's kind is determined on the basis of its ontogenesis and its potentialities as well as its current properties.

If one thinks of fetuses in this way, in context as it were, there is little room to doubt that they are the most immature members of our species. Each one is advancing, more or less successfully towards maturity. It seems to me that this is a major motivation in the conservative's appeal to principles of potentiality. It is their assurance that fetuses do not change kind during gestation.

Though conservatives like May have not adequately proven that every unborn human is clearly a human being (zygotes proving the

exception), they have articulated what seems to me a rich and reasonable understanding of unborn human beings. Certainly, an adequate theory of the moral status of human fetuses will have to take into account the full dimension of their being.

Chapter 5: Conclusion

In retrospect, neither Michael Tooley, L.W. Sumner, nor William May has provided a fully satisfying defense of their criteria for moral status or their conclusions about the moral standing of fetuses. But, of course, this comes as no surprise. Had one of them succeeded, the determination of the moral standing of human fetuses would have come to closure with his publication and this project would be of interest only as a historical research.

Although we have found no entirely satisfactory position on the moral status of the fetus, I believe that more than historical perspective has been gained here. The careful analysis of the views of Tooley, Sumner, and May has provided a guide to pitfalls to be avoided in the discussion of fetal moral standing. And, equally important, it has uncovered the unique perspective that each has brought to the study of moral status, forcing us to shape further inquiry in such a way that their intuitions and moral reasoning be taken into account.

The first part of this closing chapter is a summary of the strengths and weaknesses in Tooley's, Sumner's, and May's work. In the second part I discuss two problems that seem to preclude arriving at closure on the issue of the status of human fetuses and suggest that a view where potentialities are taken seriously may transcend other differences. I conclude that on this view human fetuses from the embryonic stage onwards have a *prima facie* claim

to our moral respect.

5.1 Summary

5.1.1 Michael Tooley's Liberal View

Tooley's strategy for defending the liberal claim that no fetus has moral standing is to refute three arguments intended to show that all fetuses from the time of their conception do indeed have moral status. He thus considers the argument that a fetus would have moral standing if it had a right to life and denies that fetuses could be the sorts of entities that bear rights. He further discounts the view that a fetus has moral standing in virtue of its being an innocent member of the human species because he thinks that moral principles about the inviolability of every human life are indefensible. And, finally, he rules out the possibility that fetuses are moral objects in virtue of their being potential persons on the grounds that a definition of potentiality that would support such a conclusion also leads to other, absurd conclusions about the moral status of gametes and systems of things that might give rise to a person.

In the first case, Tooley thinks that fetuses could not have a right to life because only entities that can desire their own continued existence can be bearers of such a right. He further contends that an entity can desire its own continued existence only if it can understand propositions about itself and its continued existence. And, since fetuses lack the conceptual capacity for this, they are not

candidates for bearing a right to life.

Tooley's rights theory is unconvincing, I argued, for three reasons. First, the way Tooley derives his analysis of rights as conditional upon desires from a theory of rights as correlates of "unforgiven" obligations is invalid. He begins with a view of rights proposed separately by Stanley Benn and Richard Peters where entities are thought to have rights if and only if someone else has a corresponding obligation that the right bearer wants fulfilled.

From this Tooley reasons that rights then must be conditional on a right bearer's desires such that having a right means that if someone wants something, others are under a prima facie obligation not to deprive him of it.

And, finally, he thinks it would make no sense to talk about an entity wanting something if it is incapable of desiring anything. Thus, being capable of desire turns out to be a necessary condition for having rights.

His move from the Benn-Peters analysis to his own is very fast and, I believe, questionable. Where Benn and Peters point to a symmetry between rights and duties (that have not been forgiven), Tooley finds a symmetry between rights and desires (that ought not be frustrated.) I argued that Tooley put too much weight on the role of desire in rights and that this misplaced emphasis accounts for the oddness of the view of rights he ends up defending.

There is also difficulty in his interpretation of desire as the possession of a certain kind of propositional attitude, viz. a desire that a certain proposition be true. There are other views about the nature of desire which do not entail that a subject be capable of

understanding language. It may be the case that Tooley's understanding of desire will turn out to be the most persuasive; certainly, discussion of the issue is not closed. But, in view of the diversity of opinion on the matter, it is hasty of him to assume the truth of a view which claims that desires are necessarily desires that certain propositions be true. Such a view is not well enough established to provide a sound basis for a theory of rights. He ought, therefore, to qualify his conclusion that the capacity for language is a necessary condition for possessing rights by noting that its truth is contingent on the success of a particular understanding of desire.

The third reason Tooley's view seems unconvincing is that on his theory, entities that cannot desire not to be treated in certain ways turn out to have no right not to be so treated. The examples he cited are of unconscious people, of infant boys who cannot desire not to have certain medical procedures performed on them and of young girls who cannot desire not to be conditioned into mindless automata. In all three cases, it would appear that according to Tooley's theory, the individuals had no right not to be so treated yet Tooley thinks we should say that they do have such rights.

His solution to the dilemma is to modify his theory by including a "time factor", that is to say, he allows that entities would have rights if they can *at some time* in their lives have the appropriate desires.

I argued that, on the face of it, the introduction of the "time factor" would lead Tooley into inconsistency because fetuses, at some time in their lives, would assuredly desire their continued

existence. Tooley anticipated such an objection and contends that fetuses are not the same subjects of consciousness as later human beings who desire to continue living. He argues that later human beings have no memories of a fetus' life nor are their states of mind connected to those of a fetus.

I suggested that there was merit to his rejoinder but that physical continuity could substitute for memory in establishing an identity relation between a fetus and a later human being and that the relation would be stronger once a fetus developed a "psychology" of its own. Hence, it seemed that some case could be made for saying that a fetus is the same being or perhaps the same person as a later human being.

The last conservative claim that Tooley addresses is the contention that fetuses derive their moral standing from their status as potential persons. As we saw above, Tooley disagrees with this contention because on his analysis of the notion of "potential person", no fetus can fit the description and, hence, no fetus has moral standing in virtue of its being a potential person. In view of this, he chose to develop a different definition of the term¹, one under which fetuses would count as potential persons. He then shows that if this new definition were used, gametes and systems of things that could give rise to a person would turn out to have moral standing --- which would be absurd, or at least highly unintuitive.

Tooley's reasoning on this account is problematic from the

¹Tooley's preferred definition is, "X is a potential person if and only if X has all or almost all, of the properties of a positive sort that together would be causally sufficient to bring it about that X gives rise to a person, and there are no factors present within X that would block the causal process in question" (Tooley; 168).

start. His motivation for developing the "new" definition of "potential person" is that fetuses, allegedly, would not be potential persons if the usual definitions were used. I believe that his conclusion here is unwarranted. The usual definitions that he rejects are:

S is a potential person if S will, in the normal course of affairs, develop into a person.

and

S is a potential person if S will, if not interfered with, develop into a person.

He discounts the first definition because of the counterexample of a society where most pregnancies miscarry. In such a society, fetuses would not, in the normal course of affairs, become persons for the majority of them do not. It would be "normal" in such a society for a fetus not to become a person. I do not think the counterexample is effective because it assumes a statistical understanding of "normal", i.e. x is "normal" in an environment if x is statistically average in that environment. "Normal" also has a teleological sense where x is normal if x fulfills its natural function. For example, the purpose of the eye is to allow its owner to see; if it does that, it is a normal eye. If it fails to do so; it is abnormal. (I suppose that in a society where 60% of the people were blind, a "statistically" normal eye would be "teleologically" abnormal.) In the case of the development of fetuses into persons, if

one uses the teleological sense of "normal", then fetuses are potential persons because in the (teleologically) normal course of affairs, fetuses do develop into persons - even in societies where most pregnancies miscarry.

Tooley rejects the second definition of "potential person" because he thinks that no fetus can become a person simply if others do not interfere with the process; he contends that fetuses also need to receive nutrients and shelter to develop into persons. Thus, since fetuses need more than non-interference, it is not the case that they are potential persons.

I object on the grounds that it is unreasonable to say that something lacks active potential to acquire a property merely because it needs ordinary life support. Further, if Tooley is right, no living thing has active potential to acquire any property because they all need life support. Hence, Tooley's rejection of the second definition is unjustified.

Tooley, then, has not satisfactorily shown that, under ordinary definitions of "potential person," a fetus is not a potential person. Because of this, I claimed further that the arguments he develops to show the absurd and unintuitive consequences of holding that fetuses are potential persons (under his new definition) are, in fact, arguments against a straw man. The "new" definition that he felt he had to use was, by his own admission, vague; it incorporates, for reasons I was unable to discern, terms like "gives rise to a person" rather than the usual "becomes a person" and "all or almost all the properties" needed to develop into a person rather than, simply, "all the properties..." needed to develop into a person. Given such open

ended terminology, it came as no surprise to learn that all sorts of things seemed to be potential persons. The biblical void itself would be a potential person for, with a little assistance from God, it too has given rise to many a human person. Of all of Tooley's arguments, his response to the conservative appeal to the fetus' potential is the weakest.

Though Tooley does not succeed in refuting the arguments he addresses, his work is most helpful for understanding the notion of moral status. His characterization of persons as entities that have a right to life allows us to avoid the lengthy and confusing array of discourses on the nature of personhood and its relevance to the ethics of abortion. It prompts us to focus our attention on the conditions for bearing a right to life, for it assumes that if any being has a right to life then, certainly, it has moral standing. This distinction motivated my decision to eliminate discussions of fetal personhood from this study, and I am indebted to Tooley for showing that the question of personhood is not inextricably bound to that of moral status.

Though his arguments are intricate and often difficult to follow, the organization of his discourse is clear. He shows how the mélange of abortion talk about rights to life, potentialities, fetal development, species chauvinism, and so forth, can be organized into a coherent assessment of claims to fetal and infant moral standing. He works simply with a list of properties that are assumed to guarantee moral status and asks whether fetuses and, later, infants possess those properties. His discussion is thorough and honest for he goes to great lengths to respond to criticisms of his work. As a

comprehensive research, Abortion and Infanticide is enviable.

One last, particularly noteworthy contribution is Tooley's realization of the dangers of discussing the morality of abortion in isolation from that of infanticide and the killing of non-human animals. (see especially Tooley; 422-424.) As he notes, unless potentialities are morally relevant, there is serious need to revise the view that the destruction of non-human animals is permissible where infanticide is not. And if potentialities **are** morally relevant, then liberals in the "abortion debate" must look for a basis for their belief that abortion is moral while infanticide is not. Certainly, one of the requirements of an adequate solution to the question of fetal moral status will be that it articulates corollary claims about the morality of infanticide and the killing of non-human animals.

5.1.2 L.W. Sumner's Moderate View

Sumner's strategy for defending the moderate claim that some fetuses have moral standing and some do not is to refute the contradictory liberal and conservative views and then to offer defenses of his moderate "differential" view, first on the basis of intuitions and then from moral theory.

Sumner's first argument is that liberals and conservatives are caught each in their own respective dilemmas. Their views, he contends, could be argued either on the basis of moral intuitions or as positions validly derived from an established moral theory. If they choose the former strategy they must adopt shallow and arbitrary criteria for moral standing. Should they try to derive their

claims from deeper, more general principles of morality, they would end up with equally bad results. Sumner reasons that any theory from which liberals can derive their thesis will also justify infanticide and that the conservatives' appeal to natural law theory requires that they concede the immorality of contraception. As Sumner sees it, either way they turn, liberals and conservatives stand in that venerable strait between Scylla and Charybdis.

The sentience criterion that Sumner proposes as the standard for moral status seems to square with moral intuitions and to provide an elegant solution to the problem of establishing both inclusion and comparison criteria. Further, he argues that the sentience criterion derives clearly from classical utilitarian moral theory and that classical utilitarianism is itself the best version of utilitarianism. All told, his differential view seems to offer a much more defensible position than either of the others.

Sumner's criticisms of the liberal and the conservative are compelling. His objections to an intuitive defense of the liberal view, I believe, are on mark, for if liberals claim that no fetus has moral standing but that all infants do, they have to say that birth is the occasion at which a fetus crosses over into the moral community from which it has hertofore been excluded. Yet, all of the changes that attend birth provide but arbitrary and shallow criteria for moral standing. Sumner considers, for instance, the change of location from inside to outside a woman's body. In and of itself, locations seem morally insignificant, as do an individual's accessibility. Also, that an infant "handles" its own respiration, digestion and excretion is thought to be unimportant from the point

of view of moral considerability, for many human beings cannot perform these basic life functions on their own yet retain their moral standing.

However, birth does occasion a change in the fetus' condition from its being parasitical upon a woman to not being so, and it seems that one can do things to a fetus qua parasite that ought not be done to an infant. Sumner thinks that the parasitical relation does not affect an entity's right to life, however, but only what can be done to it in certain circumstances. I think his assessment is by and large accurate and suggest that the case of Siamese twins where one is dependent on the vital organs of the other to sustain its life is a case in point. The parasitical twin is still be thought to be morally considerable, though it is not wrong to kill it by detaching it from its host. In view of these considerations, then, a liberal's choice of birth as a moral watershed seems less than perspicacious.

The alternative of defending the liberal view as derived from an established moral theory was seen to be no more rewarding. Sumner holds out Michael Tooley's attempt to derive it from a theory of rights as desires. Clearly, infants are no more capable of desiring their continued existence than are fetuses and thus it follows that, on this theory, both infanticide and abortion are justifiable. Sumner's contention is that any theory that denies moral standing to all fetuses also denies it to infants.

Sumner arrives at this conclusion very fast, without examining any liberal theory other than Tooley's (which, ironically, he finds wanting) (Sumner, 1981:57-64 *passim*). I introduced Christina Hoff Sommers' and Ronald Green's work as representative of other

liberals who argue specifically against infanticide but for abortion.

Sommers derives the conclusion that while abortion is permissible, infanticide is wrong, from her *Principle of Nurture*. The *Principle of Nurture* states that moral agents have obligations to care for their infants. She thinks that fetuses are not covered by this principle because moral agents cannot freely commit themselves to the nurture of fetuses. The nurture of fetuses is the result of involuntary physiological processes in the woman, thus, it is not something she can freely undertake and hence, it is not the subject of her moral choice and does not bind her.

I disagree with Sommers' conclusions on the basis of what seem to me clear examples of voluntary protection and nurturance of fetuses: the treatment of the fetus as patient, perhaps as a recipient of intrauterine surgery, a woman's abstention from alcohol, tobacco or harmful drugs during pregnancy and finally, her refusal to terminate pregnancy for the sake of the fetus.

The root of the difficulty is in Sommers' unusual interpretation of "protect and nurture" as interactions that entail actual touching or handling of the subject. I think her characterization is open to counterexamples like the defense of a victim, the giving of charitable gifts, and the passing of laws granting either liberty or welfare rights. In view of all this, it seems that the *Principle of Nurture* could apply to fetuses as well as to infants, thus vitiating Sommers' attempt to justify abortion but not infanticide.

Ronald Green's approach is from a general theory about the nature of morality as a vehicle for settling social disputes. He reasons that if it were the case that morality was about avoiding and settling

social disputes there would be a class of entities who "naturally" came into the sphere of morality, viz. those who could cause social discord and be persuaded by moral discussion to avoid or redress it. Hence, that class of beings would "naturally" have moral status. Or, as he put it, they would have "basic" rights. This would not preclude the possibility of other entities having rights, for moral agents, he says, can confer rights upon them. That is to say, they can decide to include some other class of beings into the moral community with all the privileges thereof. Such a class would have "conferred" rights or moral standing.

The norm for granting "conferred" rights is, according to Green, that the destruction of members of a class would cause serious harm to moral agents. Hence, the decision to confer moral standing is not to be arbitrary or whimsical; it is to be based upon the effects that destroying members of a given class would have upon the "natural" moral community. If the destruction would have deleterious effects e.g. causing fear, insecurity, revulsion etc., the members of the class would have rights conferred upon them. But where this were not the case, the moral community would not be compelled to protect it.

In the case of infants and fetuses, we would conclude from this that infanticide is wrong because the destruction of infants is harmful to the class of moral agents and that abortion is permissible because there is no evidence that the destruction of fetuses threatens the "natural" moral community (and there is evidence that preventing their destruction poses great difficulty for some members of it).

There are several points at which I think Green's theory is open to criticism. For one, not everyone would agree with his understanding of the foundation of morality. Quite a lot of people would say that morality is about maximizing utility or about promoting virtue or doing one's duty towards fellow human beings. Further, his derivation of the character of the "natural" moral community from his social harmony understanding of morality seems also to be inadequate. For, though the ability to create and redress social discord can generate the responsibility or the duty to do so, it does not necessarily entail that only those with duties have rights. It is plausible to think that the enjoyment of rights derives from the ability to enjoy the fruits of social harmony. Thus, the class of entities with "basic" rights could be broader than that of moral agents per se.

Finally, in spite of Green's assurance to the contrary, it seems that conferred rights are considerably less stable than basic rights just because their existence depends on the perception of moral agents that the destruction of members of a class of incompetents would be harmful to the moral agents. This opens up the possibility of conferring rights and of then withdrawing them as perceptions change. And, as Green has not provided any clearcut guidelines for determining when there is or is not a threat to the "natural" moral community, it is open to speculation what will be perceived as "not posing a threat." Certainly, slave owners and Nazis thought that blacks and non-Aryans were neither competent moral agents nor that their destruction would harm the "true" community; histories of imperialism should provide ample reason to avoid predicating rights

on the perceptions of the "natural" superiors. In the end, then, Green's theory does no better at justifying abortion, while forbidding infanticide, than does Sommers'.

Thus, Sumner's objections to the liberal thesis hold. So far, there is no moral theory that implies that no fetuses have moral standing but that all infants do have it. And, liberals have not generated any non-arbitrary standards to support the intuition that birth is the event at which a fetus acquires moral status.

The dilemma that Sumner drew for conservatives, however, turns out not to be so binding. Sumner had contended that their appeal to the natural law principle of potentiality for protection of fetuses forced them to accept also the wrongness of contraception.² And, that since contraception was clearly not wrong, a basis in natural law would not be impressive. This point seems to me not well taken because the gametes Sumner claims have potential for developing into adult humans just do not have that potential. Sperm and ova, in and of themselves, do not develop into adult humans. They, as individual entities, cease to exist at the time of conception.

The only possibility for saving Sumner's point here, I think, is to assume the "deep structure" of an ontology of process. It might then be the case that gametes, as elements in the process that ends in an adult human being, can be said to have potential for becoming an adult human being. But, as Sumner nowhere asserts the truth of

²Sumner also contended that assigning rights on the basis of potentiality was unusual and counterintuitive. I argued that it was not as many rights appeared to be held on the basis of the bearer's potential, e.g. the right to an education and to health care and the right not to be treated in such a way that a subject could not exercise some right s/he would have come to possess in later life.

process philosophy or his espousal of it, I think it fair to say his criticism of the conservative view on this account is at a stalemate.

The difficulties Sumner discovers for the conservatives from the point of view of intuitions are harder to dissolve. The conservatives' conclusion about the moral status of fetuses is part of their intuition that every member of the human species bears moral status. Sumner thinks that if this means that they believe that being a member of *homo sapiens* is sufficient for moral standing, then conservatives are chauvinistic.

However, he considers the possibility that the conservatives' underlying intuition is, rather, that all members of species whose paradigmatic members are intelligent, bear moral status. In this case, the property that indicates moral standing in a class of beings is intelligence.

But if this is the conservatives' view, he contends, they must account for their willingness to assert a criterion of moral standing as good for a class but not for individual entities that can meet it, i.e. it is inconsistent to say that the class of humans has moral standing because its paradigmatic members are intelligent but that individual primates, for example, lack moral standing, even though they display intelligent behavior. There is no reason to suppose that criteria for moral standing should be criteria for classes of beings but not for individual beings. As Sumner charged, this is but a veiled form of species chauvinism.

I suggest that his point is extremely well taken especially in view of the fact that many people think it most virtuous to recognize the moral status of even irreversibly incompetent humans

while never entertaining the possibility of doing so for individual non-humans that demonstrate the ability to reason, use language and form relationships.

There is another way, however, to interpret the claim that all human beings have moral status. One can think of it as a claim that **all** human beings have moral status. It can be regarded as a denial that some human beings on account of their race or sex or social status, lack moral standing. Accenting "all" rather than "human beings" turns the claim into a statement of humanism, not necessarily into one of chauvinism.

As such it becomes a counsel to count in all human beings as opposed to only elite humans and not a developed claim about necessary and sufficient conditions for moral standing. It remains to be seen whether humanism, however, does in fact imply chauvinism. I suggested that judgment on the point should be reserved until the conservative's defense of humanism could be examined in the next chapter.

As it turns out, the conservative's humanistic premiss is derived from natural law principles that affirm an obligation to provide entities with whatever they need to fulfill their natures. As such, the claim that "all humans have moral status" is not chauvinistic because the natural law principles could also imply that non-human animals ought to receive what they need to fulfill their natures.

We are thus in a position now to conclude that Sumner's criticism of the conservative's claim is not justified because that claim does not yield a shallow criterion of moral standing; it is not chauvinistic. One horn of the dilemma is avoided. The other may or

may not be serious depending on the strength of the ontological theory from which it seems to be derived, viz. an ontology of process. For the time being, though, it is fair to conclude that Sumner has not discredited the conservative claim that all members of the species *homo sapiens* have moral standing.

The last support for his moderate, differential view is a positive defense of it, first, from the point of view of moral intuitions and then as a claim derived from classical utilitarian theory. Sumner proposes the capacity for sentience as a criterion of moral standing. He takes it to encompass not only the capacity for physical sensation but also the higher capacities for intellectual, aesthetic and moral sentiments. Sumner reasons that it would be adequate as both an inclusion criterion and a comparison criterion: all sentient beings have moral standing but those with greater capacities have more than those with lower capacities.

I took issue with Sumner's theory on the grounds that as a comparison criterion, it leads to the counterintuitive conclusion that human beings with little of the "higher" capacities count for less than those who are more gifted. I also suggested that he was inconsistent in ruling out at least normal human fetuses at all stages of development because he stated that only when sentience could not be engendered were we to conclude we were not dealing with a sentient creature. It seems to me that although sentience cannot be engendered in early fetuses, the fact that they will very soon develop it should warrant their being included. I suggested that Sumner should agree with this because he would probably say that if it took a few months to engender sentience in an adult, the adult

would still count as a sentient being and thus if it would take a few months for sentience to develop in a fetus, it, too, should count as a sentient being.

From the point of view of moral intuitions, then, the sentience criterion fails as a comparison criterion and would be admissible as an inclusion criterion only if it were expanded to include the constitutional potential for sentience.

Sentience, both as inclusion and comparison criterion, appears to follow validly from classical utilitarianism. This would be a strength except that as a comparison criterion, the conclusions are so counterintuitive as to cast doubt on the worth of classical utilitarianism itself. And, if that is the case, our motivation to see its derivation from utilitarianism as a strength is defused.

Further Sumner's appeal to classical utilitarianism fails to generate the moderate position on abortion that he assumes. The moral theory gives him a moderate and differential view about the moral status of fetuses but, in the utilitarian calculus on which moral decisions are made, moral status is but one factor. The central utilities of any entity, including morally considerable late term fetuses, are overridden where the total of side utilities outweighs it. In principle then, classical utilitarianism supports a liberal view on abortion rather than a moderate one.

Nonetheless, Sumner's contributions to the project of fixing criteria for moral standing are considerable. His insistence on separating justifications based on moral intuitions from those based on derivation from more general moral theory is an invaluable heuristic device. The distinction helps identify modes of strategy

thus enabling an appropriate response. Moreover, it forces a recognition of the fact that claims about moral standing as well as other moral principles may be embedded in a deeper moral or, as we have seen in the discussion of potentiality, in a deeper ontological theory.

Taking this phenomenon of embeddedness seriously in turn forces a confrontation of the possibility that the question of moral status cannot be answered outside of a successful defense of the deepest structures of moral and perhaps ontological belief. It also requires contemplating the real possibility that if the deeper moral theories themselves are not founded on reason but on moral intuitions, the issue of moral status may just be altogether undecidable.

Sumner's work is also illuminating in other ways. His reiteration of Tooley's caveat to liberals on the importance of taking the infanticide charge seriously lends urgency to the task. And, negatively he shows the importance of potentialities. His sentience criterion would be a plausible inclusion criterion if it included potential for sentience. His own admission that entities in which sentience can be engendered count as sentient beings reveals, I believe, his sensitivity to the importance of potentialities. Thus, he has revealed at least two components of a good theory of moral status: if it is going to deny standing to all fetuses, it must explain why infants count and it must defend a credible statement on either the relevance or irrelevance of potentialities.

5.1.3 William May's Conservative View

May's argument for the view that all fetuses, from the time of conception, have moral standing is derived from two claims. The first is a "Humanistic Principle" which asserts that every human being, i.e. every member of the species, *homo sapiens*, has rights equal to that of any other human being. The second is an empirical claim, that every human fetus is a human being, a member of the species, *homo sapiens*.

May draws support for the Humanistic Principle from Aristotelian natural law theory. According to this theory, the reason that members of our species have natural rights to life, liberty and so forth, is that they are all either developing or maintaining a status of "perfect" or mature humanity. Being a rational animal is the *telos* common to each member of the human species. Hence, as is it our nature to become fully human (or to exercise our full humanity, if we are already mature), each of us has a natural right to that which we need to gain or maintain our human status - to whatever level we are capable.

On the face of it, it seems that no one would deny that all human beings are entitled to their natural rights. Michael Tooley, however, suggested that irreversibly comatose human beings lack a right to life. In this, it seems that May should concur because the irreversibly comatose cannot either strive to acquire or to maintain an even minimal level of human "perfection."

Gareth Matthews arrived at the same conclusion but derived it from the Aristotelian characterizations of "life", where the

irreversibly comatose are thought to be "alive in the way that plants are alive" but, lacking the capacity for psychological control, they are not "alive in the way that animals are alive." He thinks that the lack of psychological control in early (up to 13-14 week) fetuses reveals a comparable lack of "animal life." I expressed some dissatisfaction with this conclusion on the grounds that early fetuses, though they lack the capacity for psychological control, still are not "alive in the way that plants are alive," in virtue of their potential for psychological control, a feature no plant displays.

At any rate, there are some members of the species *homo sapiens* that do not have rights equal to those of any other member. Since the irreversibly comatose lack a right to life, the Humanistic Principle is not universally true. However, since fetuses are "struggling" to develop into mature members of the species, it seems, according to natural law theory, that they have a right to the "real goods" they require to develop to whatever degree they can.

Two further objections that conservatives like May need to address are those of species chauvinism and the "is-ought" derivation problem. In the first case, we saw that May, himself, could justifiably be said to espouse a species chauvinism because he believes that all and only human beings, in virtue of their possession of a spirit, have any rights.

Barring any forthcoming defense of May's claim, there seems to be no reason to exclude non-human animals from the domain of natural law theory where they could be thought to have a prima facie right to what they need to develop or maintain their respective natures. This would require, minimally, that they not be killed nor

that their habitats be wantonly destroyed.³ Were conservatives willing to allow that non-human animals possess a *prima facie* right to what they need to fulfill their natures, they would not be guilty of species chauvinism. In other words, species chauvinism is not intrinsic to the conservative's view on moral standing.

As for the second objection, that natural law theory derives normative claims from non-normative statements, I see no avenue of recourse for conservatives. It is indeed the basis of natural law theory that because an entity has a certain nature that it ought to have what it needs to live in accordance with it. I can only conclude that there is room for doubt as to the soundness of natural law theory as a whole.⁴

It would seem then that the strength of Premiss I, the Humanistic Principle, is tied to the plausibility of natural law theory. But there is also the possibility that it could be established on the basis of moral intuitions currently shared by members of our culture. This alternative seems quite likely since the denial of rights to members

³I assert this with some hesitation, for according to natural law theory, only members of *homo sapiens* are thought to be capable of developing or maintaining the capacity for rational thought; non-human animals are, one and all, categorized as irrational animals. Hence, they might have a right to life but nothing more. However, in view of research that has revealed the capacity for rational thought in some primates and perhaps, cetaceans, natural law theorists will need to rethink the basis for their former conclusions. It may be that merely refraining from destroying intelligent non-humans will not be enough.

⁴Still, the natural law theorist may charge *tu quoque*, for neither utilitarian moral theory nor any of the deeper underlying theories of rights to which thinkers appeal, are themselves flawless.

of our species counts as an important counterexample to any principle that would imply it.

Trying to establish the Humanistic Principle on the basis of moral intuitions is not an option conservatives should embrace. As we have seen, intuitions, being what they are, are bound to differ. It is safe to say that many of the members of our culture who are staunch believers in liberal humanism do not "see", as conservatives do, that the rights of humans ought also extend to members of the species *in utero*. If conservatives want to establish the Humanistic Principle in such a way that it will imply that fetuses also have rights, they will have to derive the principle from natural law theory and respond as they can to the charge that their deeper moral theory is founded on an error in logic.

May offers his second premiss as an empirical claim about the species membership of human fetuses. He asserts that all fetuses from the time of conception are members of the species *homo sapiens*. Intuitively, one wants to agree with him, if only because every text of developmental biology sets the beginning of human ontogenesis at conception.

Nonetheless, there are differences of opinion. Joseph Donceel appeals to hylomorphic theory to conclude that zygotes and perhaps early embryos belong are not human beings because they lack a characteristically human form which he takes to be the same as a human soul. He thinks that no human being is present unless the entity is animated by a human soul. The main difficulty I see with this view is that the talk about souls or animation is superfluous. Donceel should simply assert that there is no human being present

until there is a human form.

Saying this, Donceel would have said as much as Lawrence Becker, the difference between them being that whereas Donceel thinks a human form is present as soon as it is recognizable and that rudimentary organs are formed, Becker thinks the form should be refined and the organs functioning before we should say the fetus is a human being. Between the two opinions, we could conclude that a fetus becomes a human being at some point between six weeks and seven months.

This indeterminacy is a drawback to the "form" criterion in that it provides little basis for making a decision about the moral status of fetuses during most of the period of gestation. Further, Becker offers no reason for preferring a more fully developed human form as a standard for humanity over a less refined form. Lacking such a reason, one could say that a time during childhood or perhaps at puberty, is the point where there the "human becoming" acquires human form because after birth, the frontal lobes of the brain develop enormously and the reproductive system is not fully formed until even later. A crucial part to Becker's argument is missing and its absence is seriously damaging.

Gareth Matthews argues that a human fetus becomes a human being when it becomes a psychological being, that is to say, when it develops the capacity for psychological control. Prior to this, the "proto-human" is a human thing, a human body.

I think Matthews' view has two distinct strategic advantages. The first is that it is not theory bound in that all he requires for moral standing is the capacity for psychological control. Dualists, identity

materialists and functionalists could each fill this in as they saw fit.⁵ The second is that it makes for a more plausible identity claim between fetuses and later human beings. Once a fetus is a psychological being, it can be psychologically connected with a later human being. Since such a fetus is already physically continuous with a later human being, a stronger claim can be made in behalf of ... "an identity in being" between it and a later human being.

The view is also intuitive in that we normally find it plausible to discuss the rights of animals (especially if they are human) but not so those of plants. Recent court decisions in behalf of ending life support for irreversibly comatose humans also lends strength to Matthews' intuition that moral standing ends with the "departure of the psyche."

I hesitate, however, to endorse the view that humanity begins with the "arrival of the psyche" because the proto-human's potential to develop psychological control makes it alive in a way that no plant or human thing is alive. Though the "behavior" of the proto-human is plant-like, its development in the direction of animal life sets it apart plants and from human things like hearts and tissue. Its potential makes it different from a human body that has lost all or even only frontal brain function. I believe that the distinction has important bearing on the way a human fetus ought to be categorized.

If it is true that potentialities are one of the factors that reveal the species membership or the nature of an entity then, May's

⁵Perhaps a dualist would take issue here, for s/he might say that a soul was present all along in the proto-human but could not function until the body was sufficiently developed. I do not think this would constitute a strong objection to the criterion because dualists would have to explain how they know a soul is present in the body before it manifests itself - not an easy task.

contention that human fetuses are human beings is correct. But, he has not shown that *all* fetuses are human beings. Zygotes, it will be recalled, are unique in the sense that they are developing into both one or more human beings and one or more human things (amnion). Thus, prior to the point of differentiation at the onset of the embryonic stage, a fetus cannot properly be called a member of the species because there is no discernible *it* to call a human being. I suggest that there is little sense in speaking about a member of the human species until there is an individual entity to refer to that is at least in the process of developing into a mature member of the species.

In the end, May has not shown what he had intended to show, viz. that "the baby still not born, is a man in the same degree and for the same reason as the mother." But his is the most articulate use of the principles of potentiality that have been such a enigma to moderate and liberal thinkers.

His work reveals that potentiality is indeed the key to understanding the conservative position. He has shown that it is the foundation of natural law theory where a human being is entitled to natural rights just in virtue of its having the potential to develop traits that are typical of a mature member of the species. Noonan put it quite well when he said that he knew something was a man because ... "he came of human flesh and is expected, at some point, *to be able to perform a human act, to think a human thought.*"

Drawing from natural law theory, the conservative sets the foundation of a fetus' natural rights in its potential to develop into an adult human being.

The conservative is confident in asserting that every fetus will develop into an adult human being because it is a member of the species *homo sapiens*. He knows the fetus' species because the fetus is the same being as a later member of *homo sapiens*. It is in virtue of the identity relation that a fetus holds with an adult human being that it can be said that the fetus is the same being as that adult. If they are indeed the same entity, one can be confident that there has been no change of kind or essential change during the course of gestation.

Here again, the conservative appeals to principles of potentiality. It is because the fetus has the active natural potential to develop into an adult human being that he knows that it will be the same being as a later adult human being.

May's argument is one of the best articulated conservative statements on the moral status of fetuses. He takes great care to justify the claims that, unfortunately, most conservative authors assume everyone immediately sees the truth of. Further, the justification he draws up is well founded in natural law theory. But, as we have seen, this may well be his principal undoing for the worth of his argument is bound to that of natural law theory.

Still, May's appeal to potentialities as the basis for natural rights and for deciding whether or not human fetuses are human beings is an attractive approach to the problem. An important question to answer is whether the potentiality principles he needs can be established outside of the framework of natural law theory.

5.2 Further Directions

At the beginning of this research, I warned that *the* definitive answer to the question of the moral status of fetuses would not be discovered here. But I believe that what has been accomplished is a good "second best." The result of trying to grasp and assess what has already been said on the issue now enables us to sketch some of the features that a definitive answer should have.

From our present vantage point we have an overview of the route the arguments have followed, their points of departure, and their overall "seaworthiness." One observation we are able to make is that there are two points at which they repeatedly founder, two difficulties that will have to be surmounted in an adequate theory of moral status.

The first stems from the fact that the various views on the moral status of fetuses are defended with principles and assumptions which are themselves derived from more basic, incompatible theories. Hence, there seem to be differences in "deep structure" that may be irreconcilable.

The second difficulty has to do with the confusion surrounding the significance of the fetus' potentiality. The notion appears in all three of the positions discussed above, but there has been little agreement on the meaning of "potential person" and less on its role in the determination of the moral status of fetuses. This then, is a second issue that needs to be resolved.

What follows is some further clarification of these two problem areas offered in the hope of finding a way to get through them.

5.2.1 Differences in Deep Structure

Over and over again, criticisms of arguments have ended by pointing out that underlying principles or assumptions that had been appealed to would not be acceptable to the "opposition." In some instances they were principles derived from moral theories or intuitions colored by the assumption of the truth of a moral theory. In others, they seemed to go deeper, to the author's basic ontological beliefs.

We have seen Tooley develop his theory of rights as conditional upon desires from theories of rights formulated by Joel Feinberg, Stanley Benn and Richard Peters. In all of these cases, however, no mention was made of the natural rights theory from which conservatives like May draw their conclusions. Thus, it should be no surprise that what seems like a perfectly cogent solution to the question of fetal rights to Tooley will make little impression on anyone who does not see the plausibility of his rights theory. May, for one, would never be persuaded that fetuses lacked a right to life because they were incapable of desiring their continued existence; nor, on the other hand, would he care that it was reasonable to press their claims because they seem to have interests, as Feinberg suggests. (Feinberg;1984) May is only looking at the fetus' "nature" and that is enough to tell him that it has the same rights as every other entity with a human "nature." Thus, since conclusions about the fetus' rights are derived from a more basic theory of rights, it would seem that we must wait upon the solution to the rights question before we can get on to the fetal rights question.

Difficulties arose in the same way where utilitarian principles were used to respond to conservative arguments. Tooley's is the best case in point. We saw that the bulk of his objections to the argument from the fetus' potentiality were framed in utilitarian terms that would only fall on deaf conservative ears. Sumner, of course, deliberately developed his position from utilitarian moral theory presumably because he finds it the most convincing. Hence, one would not expect him to be persuaded by a good natural law argument.

Some of the most interesting differences emerged from the incompatibility of theories of mind or human nature as in Tooley's stipulation that fetuses and later human beings must be the "same subject of consciousness" for them to be the same being, compared to May's assertion of "sameness of being" on the grounds of the fetus' active natural potency. And, a view like Donceel's where human beings are thought to have souls, (or in May's case, spirits) further widens the gap and must be addressed before we can speak convincingly about the fetus' future and the significance of its potential.

And, finally, both Tooley and Sumner at times have seemed to assume principles of process philosophy, where the process that yielded a human person was as "real" as a fetus. This comes out quite clearly, I believe, in the four arguments Tooley offered against the moral significance of the fetus' potentiality and it seemed to me also the best explanation of Sumner's belief that gametes were potential persons. That is to say, in both cases, it seemed that the only reason one would think that a process or a system or a gamete

was a potential person was that one believed that processes have some ontological standing of their own, that they are not categories of the understanding, or linguistic constructs, or beings of second intention. If this is plausible, there is further cause to say that, indeed, the end of differences is not in sight.

It is true that I have only sketched my reasons for believing that a significant obstacle to achieving closure on the moral status issue lies in the incompatibility of the deeper theories from which the arguments are drawn. Perhaps a sustained study would reveal that my worries were unfounded but, for now there appears to be cause for concern, for how else is one to argue for or against the moral status of fetuses except by appealing to the principles of a more general moral theory, and how can one escape seeing things except through an ontological framework?

5.2.2 Potentiality, Rights and Sameness of Being

Among the factors which have been introduced into the arguments for or against the moral status of fetuses, one offers promise for advancing the discussion and may produce a "transtheoretical" meeting place. This is the alleged fact that a human fetus is the same entity as a later human being.

As we saw above, May's appeal to natural law principles of potency is an attempt to establish that there is a "sameness of being" between the fetus and a later human being. It is thought that the fetus' active natural potency for developing traits typical of adult human beings guarantees that it is an undeveloped or immature

human being.

The issue of "sameness of being" also plays a significant part in Tooley's argument for denying that fetuses are the subjects of rights. He rules them out because he believes there is no time in their lives in which they are capable of desiring to continue their lives or of desiring any other thing. However, he is prepared to concede that if fetuses were the same "subjects of consciousness" as later human beings, they would be the subjects of rights, for there *would* be a time in their lives (when they were older) that they would have the capacity to desire.

Further, this "time factor", as I have called it, seems to be an essential feature of any good theory of rights. We know that the possession of moral rights is not necessarily contingent upon the actual possession of certain capacities. Moral rights are retained through sleep or coma or immaturity. We are not justified in treating human beings in certain ways for example, killing them or maiming them or brainwashing them because they cannot, at the time, desire not to have such a thing done to them or because it is not, at the time, in their interests not to be so treated or because they cannot, at the time, display psychological behavior. All that we require of them, to certify their moral status, is that *at some time* in their lives, they will meet the criteria (whatever they be) for having rights.

Hence, the answer to the question of whether an entity, S , at t_1 is the same entity as S at t_1+n is crucial to determining what may or may not be done to S at t_1 .

But, before bringing this point to bear in the case of fetuses and

later human beings, it must first be determined that a fetus is, in fact, the same entity as a later human being.

At least two answers are possible. One is Tooley's; he denies the identity because the criteria for establishing sameness of being with a human being that is a "subject of consciousness" are not met. He thinks that since the later human being has no memories of himself as a fetus and that since there is no evidence of psychological connectedness between the two, there is no basis for asserting that a fetus is the "subject of consciousness" as the later human being.

I argued that his criteria were too heavily focusses on the psychological dimensions of self and that physical continuity should count towards establishing the identity relation. I argued further that evidence of psychological behavior in a fetus that is physically continuous with a later human being was sufficient to establish psychological connectedness between the two. I concluded that, together, physical continuity and psychological connectedness are sufficient for establishing sameness of being between a fetus and a later human being that is a "subject of consciousness."

My conclusion is compatible with Gareth Matthews' view that there is a human being present once a fetus is capable of psychological behavior though he himself has not argued along the lines that such a fetus is the same entity as a later human being. Matthews suggests that the onset of psychological life is at about 13-14 weeks of gestation. If this is the case, a fetus has moral status at that time because that is when it becomes psychologically connected to a later human being as well as physically continuous

with it. The view is attractive. From it, we determine that a fetus with psychological capacities is the same being as a later human being and that it is wrong to treat a fetus in such a way that the later human being cannot exercise his rights. It will be wrong to destroy a fetus and to affect it in such ways that the later human being's capacity to exercise his rights is impaired.

But, what are we to say of May's appeal to potentialities? Do they establish an identity in being even before the onset of psychological life? It is hard to decide. Certainly, potentialities do little by way of establishing personal identity; some psychological capacity is required for that.

I believe, rather, that potentialities are useful for establishing an identity in kind, i.e. that an entity, S , at t_1 , is the same kind of entity as S at t_1+n if S at t_1 has active natural potency for developing whatever traits S at t_1+n displays that indicate that S at t_1+n is a member of its kind.

Potentialities then, are useful for determining whether a human fetus is a human being as opposed to a human thing, like a human heart or human tissue or a human body. Where it can be ascertained that a human fetus has active natural potency for developing traits typical of humankind, it can be said that a human fetus is an undeveloped or immature human being.

In this case, a fetus' moral status derives from its being one of a kind of entity, every one of which has moral standing. However, as I argued earlier, the human zygote's potentialities are mixed. It will develop into one or more human embryos and into one or more amnions. I thought that human zygotes were rather paradoxical

things --- both human things and human beings or perhaps neither. At any rate, one could not appeal to potentialities to support the claim that they are human beings. In view of this, I concluded that only individuated human embryos and human fetuses were human beings in virtue of their potentialities.

Consideration of the fetus' "sameness of being" with a later human being yields two conclusions. If one looks at it from the point of view of personal identity, one is inclined to say that fetus is the same being as a later human being when it becomes a psychological being that is physically continuous with a later human being. If one focusses on potentialities, it becomes reasonable to conclude that there is a sameness in kind between individuated embryos and fetuses and later human beings.

In both cases, fetuses turn out to command moral respect. They will have it either because refusing to treat them as moral objects constitutes an injustice to an entity that will *at some time* in its life satisfy the criteria for having rights. Or, they have it because they are immature human beings.

The two arguments are equally compelling. Since the latter, however, leads to the conclusion that human embryos as well as human fetuses proper are human beings, one must allow that individuated human embryos and fetuses have a *prima facie* claim to the same moral respect accorded to more developed members of their kind.

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